STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER, and MIKE McCLELLAND, individually and in their capacity as co-personal representatives of the ESTATE OF KEGAN McCLELLAND,

Plaintiffs-Appellees,

v

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and

HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, INEZ D. BARTON TRUST, HARRIS SEPTIC CLEANING AND ALWAYS CLEAN PORTABLE TOILETS, INC., DALE HARRIS, D & J GRAVEL CO., INC., and AMERICAN CONCRETE PRODUCTS, INC.,

Defendants.

UNPUBLISHED
April 22, 2004

No. 244689
Livingston Circuit Court
LC No. 00-017892-NO

Southfield, MI 48075
(248) 355-5555

JOHN P. JACOBS (P15400)
Attorney for Defendant-Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold, P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

Detroit, MI 48226
(313) 964-7600

CHARLES C. CHEATHAM (P11815)
Attorney for Defendant-Appellee
Eagles Aerie #3607
261 East Maple Road
Birmingham, MI 48009
(248) 642-6511

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and
HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket No:

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, Jr. (P47966)
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

JOHN A. COTHORN (P32428)
Attorney at Trial for Grand
and Michigan Aeries
530 Buhl Bldg., 535 Griswold
Detroit, MI 48226
(313) 964-7600

JOHN P. JACOBS (P15400)
Attorney for Defendant-Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold, P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

CHARLES C. CHEATHAM (P11815)
Attorney for Defendant-Appellee
Eagles Aerie #3607
261 East Maple Road
Birmingham, MI 48009
(248) 642-6511

NOTICE OF HEARING

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

STATEMENT OF COUNSEL REGARDING ORDERS APPEALED FROM

APPENDIX ON APPEAL

PROOF OF SERVICE

JOHN P. JACOBS, P.C.
BY: JOHN P. JACOBS (P15400)
LINCOLN G. HERWEYER (P55742)
Attorneys for Defendant Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and
HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket No:

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, Jr. (P47966)
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

JOHN A. COTHORN (P32428)
Attorney at Trial for Grand
and Michigan Aeries
530 Buhl Bldg., 535 Griswold
Detroit, MI 48226
(313) 964-7600

JOHN P. JACOBS (P15400)
Attorney for Defendant-Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold, P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

CHARLES C. CHEATHAM (P11815)
Attorney for Defendant-Appellee
Eagles Aerie #3607
261 East Maple Road
Birmingham, MI 48009
(248) 642-6511

NOTICE OF HEARING

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that the attached Application for Leave to Appeal of Defendant-Appellant Grand Aerie Fraternal Order of Eagles shall come on for hearing in the Michigan Supreme Court on Tuesday, June 24, 2004.

PLEASE TAKE NOTICE that pursuant to MCR 7.302 (F)(1) there is no oral argument with respect to the within Application for Leave to Appeal unless the Michigan Supreme Court so orders in advance.

Respectfully submitted,

JOHN P. JACOBS, P.C.

BY: _____

JOHN P. JACOBS (P15400)
LINCOLN G. HERWEYER (P55742)
Attorneys On Appeal for Defendant-Appellant
Grand Aerie
Suite 600, The Dime Building, 719 Griswold
Post Office Box 33600
Detroit, MI 48232-5600
(313) 965-1900

June 1, 2004

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

TABLE OF CONTENTS

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

V.

VI.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

INDEX OF AUTHORITIES

CASES

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

STATEMENT OF QUESTIONS PRESENTED

I.

THE AFFIRMANCE OF THE DEFAULT AND DEFAULT JUDGMENT PRESENTS THIS COURT WITH A UNIQUE OPPORTUNITY TO SPEAK TO A NUMBER OF MOST COMPELLING ISSUES RELATING TO DISCOVERY RELATED DEFAULTS AND DEFAULT JUDGMENTS EVER PRESENTED TO THE MICHIGAN SUPREME COURT FOR APPELLATE CONSIDERATION. SHOULD THIS COURT GRANT PLENARY REVIEW?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

II.

WAS THE REFUSAL OF THE COURT OF APPEALS' MAJORITY AND JUDGE BURRESS TO ENTERTAIN THE SUMMARY DISPOSITION AND JNOV MOTIONS RELATING TO A LACK OF VICARIOUS LIABILITY OF A NATIONAL FRATERNAL, CHARITABLE ORGANIZATION FOR THE TORTS OF THE LOCAL GROUP ABSOLUTELY CONTRARY TO ESTABLISHED LAW AND DOES IT PRESENT AN EXTREMELY IMPORTANT ISSUE FOR SUPREME COURT REVIEW AFFECTING NATIONAL CHARITIES AND FRATERNAL SERVICE ORGANIZATIONS?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

III.

DOES THIS APPEAL PRESENT A SUPERB OPPORTUNITY FOR THE MICHIGAN SUPREME COURT TO SQUELCH THE EVILS OF "MARY CARTER" AGREEMENTS IN OUR COURTS ONCE AND FOR ALL?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

IV.

DOES THE REFUSAL OF THE TRIAL COURT AND THE COURT OF APPEALS TO ENFORCE THE SETTLEMENT AGREEMENT CAPPING DAMAGES AT $300,000.00 IN FAVOR OF "AGENTS" LIKE HOWELL #3607 PRESENT AN OPPORTUNITY TO SET ASIDE THE NOMENCLATURE GIMMICKRY OF LARKIN v OTSEGO MEMORIAL HOSPITAL, 207 MICH APP 391 (1994) IN REFUSING TO EQUALIZE THE LEGAL EFFECTS OF RELEASE AGREEMENTS AND ORDERS ACCOMPLISHING RES JUDICATA IN FAVOR OF VICARIOUSLY LIABLE "PRINCIPALS"?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

V.

DID THE TRIAL COURT REVERSIBLY AND PREJUDICIALLY ERR IN FAILING TO GRANT A NEW TRIAL OR TO GRANT REMITTITUR IN THIS INFANT WRONGFUL DEATH CASE AT $8,300,000.00? DID THE TRIAL COURT ALSO ERR IN FAILING TO GRANT A CREDIT FOR THE $300,000.00 HOWELL #3607 MUST PAY? SHOULD THIS APPLICATION BE GRANTED TO FORMALIZE REDUCTION OF JUDGMENT PRINCIPLES?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

VI.

FIVE WEEKS BEFORE THE HARTER TRIAL, BOTH THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT ADVISED MR. GEOFFREY FIEGER THAT THE "ORGAN DONATION" POEM HE USES IN ALL WRONGFUL DEATH CASES WAS REVERSIBLY INFLAMMATORY. WAS HIS REFUSAL TO HEED THAT CASE AND DID HIS USE OF IT INJECT DELIBERATE PREJUDICE INTO THE TRIAL? TO ENFORCE PRECEDENT, SHOULD THIS APPLICATION BE GRANTED?

Plaintiff-Appellee says "No".
Defendant-Appellant says "Yes".

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

STATEMENT OF COUNSEL REGARDING ORDERS APPEALED FROM

Defendant-Appellant, Grand Aerie Fraternal Order of Eagles, seeks leave to appeal from the April 22, 2004 Unpublished Opinion and Order of the Michigan Court of Appeals' Majority Decision, Honorable Judges Jessica R. COOPER and Karen FORT HOOD; Honorable Peter D. O'CONNELL dissenting. (See Exhibit "A" found in the attached Appendix.)

In addition, Defendant-Appellant also seeks leave to appeal from the Eight Million, Three Hundred Sixty-Two Thousand, Four Hundred Eighty-Three Dollar ($8,362,483.00) Judgment entered in the Livingston County Circuit Court and from all adverse rulings, decisions and orders of Honorable Daniel A. Burress of that Trial Court, more fully described in the within Application For Leave To Appeal.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

APPLICATION FOR LEAVE TO APPEAL

NOW COMES Defendant-Appellant Grand Aerie Fraternal Order of Eagles, by and through its undersigned Appellate Counsel, John P. Jacobs, P.C. and John P. Jacobs and herewith makes Application For Leave To Appeal with respect to the April 22, 2004 Opinion of the Court of Appeals (Exhibit "A") and, pursuant to MCR 7.302(B)(3) and (5), respectfully asserts that the Application For Leave to Appeal should be granted as the matter is of urgent and great jurisprudential significance and that the decision of the Court of Appeals of April 22, 2004 is clearly erroneous and will cause material injustice as well as that it conflicts with decisions of this Court and with other decisions of the Michigan Court of Appeals, as is more fully stated in the Application For Leave To Appeal which now follows.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

CONCISE STATEMENT OF FACTS AND PROCEEDINGS

INTRODUCTION

This is an appeal from an Eight Million, Three Hundred Sixty-Two Thousand, Four Hundred Eighty-Three Dollar ($8,362,483.00) wrongful death judgment imposed on a party bearing no legitimate legal responsibility by virtue of a discovery Default issued as a sanction by the Trial Court for inadvertent, non-prejudicial confusion as to the details of this innocent party's insurance coverage. That is to say, the Trial Court, goaded on in no small measure by the staged outrage of Plaintiff's notorious counsel, defaulted a national fraternal and charitable service organization, Defendant-Appellant Grand Aerie Fraternal Order of Eagles ("the Grand Aerie"), as to liability in a premises liability action for an incident that occurred on locally owned premises over which the Grand Aerie utterly lacked any control, dominion or ownership.

On April 22, 2004, the Court of Appeals (COOPER, P.J., and O'CONNELL and FORT HOOD, JJ.), in a two-to-one decision, affirmed the onerous lower court judgment (Exhibit "A"). In his dissent, Judge O'CONNELL accurately surmised:

> "Because of the trial court's and the majority's **antic disposition**[1], the Grand Aerie must pay plaintiffs $8,362,483.82 without any factual or legal justification for holding it liable for Kegan McClelland's death. This immense sum serves only as a discovery sanction in a case where the timely production of the requested documents could not have provided any conceivable assistance to plaintiffs' case. . . . [T]he trial court's use of default in this case more closely resembles an improper attempt to force settlement than an attempt to remedy prejudice . . . ." (Emphasis Supplied) [Exhibit A (footnotes omitted).]

The Grand Aerie now applies to this Court for leave to appeal from the April 22, 2004 Court of Appeals Judgment affirming the Trial Court Judgment.

---

[1] Judge O'CONNELL was alluding to *Hamlet*, Act 1, scene iv, line 171: To feign madness and outrage when none really exists.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

BACKGROUND

On April 29, 2000, Co-Defendant Howell Aerie #3607 Fraternal Order of Eagles (hereinafter "Howell #3607") hosted a Family Fun Day on premises that Howell #3607 alone owned and controlled, as to which the National Organization, the Grand Aerie, had no knowledge or control. Plaintiff, Lacy Harter (a member of Howell #3607), and her two-year-old son, Kegan McClelland, attended this event. While Kegan was ostensibly under the watch of his aunt, Rhonda Harter, he fell into a septic tank with a defectively installed riser lid and drowned. (T. 11/13/01, pp 118, 180-181). There is utterly no question but that the Grand Aerie had no knowledge regarding or control of or ability to control the Local Aerie's Howell #3607's installation of the septic riser lid.

Among others, Plaintiffs sued Howell #3607, the Michigan State Aerie Fraternal Order of Eagles (hereinafter "the State Aerie") and the Grand Aerie, which is a national fraternal and charitable service organization. However, because of a default entered against the Grand Aerie on all issues of liability and proximate causation (discussed infra), the Grand Aerie was deprived of its meritorious legal defenses that it had absolutely nothing to do with the Howell #3607 Family Fun Day, or that the Grand Aerie did not own or control the Howell #3607 premises, or that the Grand Aerie did not supervise or control the installation of the septic tank riser lid, or that the Grand Aerie was not vicariously liable for the wrongdoing of Howell #3607.

Indeed, officers of Howell #3607, Messrs. Wintersmith and Brooks, testified at their depositions that the Family Fun Day and the installation of the septic riser lid were controlled solely by decisions of Howell #3607 (Wintersmith Dep., p 94; Brooks Dep, p 60).[2] Mr. Wintersmith,

---

[2] Because of the default on liability against the Grand Aerie, no liability testimony was adduced at trial. Consequently, these references to pre-trial depositions of Howell #3607 officials are necessary. The cited deposition testimony was attached to both the Grand Aerie's Motion for Summary Disposition and to its Motion for Judgment Notwithstanding the Verdict. This Court can presently find these depositions excerpts attached as Exhibits "B" and "C" to our Appendix.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

alone, installed the septic riser lid, and he did not need the permission of the Grand Aerie to do so. Likewise, the Grand Aerie's permission was not needed in order for Howell #3607 to host the Family Fun Day. (Wintersmith Dep., pp 63-64, 93-94). Mr. Brooks likewise testified that no permission was needed from either the State or the Grand Aerie to install the septic riser lid or host the Family Fun Day. (Brooks Dep., p 60).

Well before the incidents leading up to the default, there was no factual dispute of a genuine nature about Howell #3607's complete, exclusive ownership, dominion and control of the Howell #3607 premises and the Grand Aerie's complete lack of control thereof. Long, long before the default was ever attempted, in its Motion for Summary Disposition (Exhibit "D"),[3] the Grand Aerie attached a number of exhibits demonstrating the total independence of Howell #3607 which, without ever being remotely rebutted, clearly demonstrated the complete autonomy of Howell #3607 in every respect. The first of these was a deed showing that the premises were exclusively owned by Howell #3607 (attached hereto as Exhibit "E"). Also attached was the Affidavit of George Miller, the Grand Aerie's General Counsel, which specified that the Grand Aerie has no control or dominion over local aeries inasmuch as these local chapters are wholly autonomous in their decision-making (attached hereto as Exhibit "F"). This was also corroborated by both the deposition testimony of State Aerie member, Mr. Richard Downer, as well as his affidavit (attached hereto as Exhibit "G"). Under the Grand Aerie's Constitution and its Statutes (effectively speaking, the Corporate Charter and By-Laws of this charitable organization), being Article VIII(1) of the Constitution and Statute § 124.1, the premises in question were exclusively owned by Howell #3607 and were recognized to be operated exclusively by that local chapter. Furthermore, under

[3] For clarification, all exhibits attached to the motions below are now separately found in the Appendix, together with designations as to which original documents they were appended..

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Statute § 89.10, operation of the Local Aerie was not subject to Grand Aerie's supervision or control in any way whatsoever. (Attached hereto as Exhibit "H").

THE DEFAULT

The facts surrounding the default granted by Judge Burress are these. Plaintiffs' Interrogatories 8 and 9 requested information regarding the Grand Aerie's insurance coverage. On February 26, 2001, the Grand Aerie answered these interrogatories by reference to a letter to be forthcoming from Defense Trial Counsel, Mr. John Cothorn (Exhibit "I"). On April 19, 2001, Mr. Cothorn wrote to Ms. Tanya Ball, of the McLarens Toplis of North America Inc. Agency ("McLarens"), which is the third-party administrator for (among others) Legion Insurance Company, requesting specification of the amounts of all primary **and** excess coverages that existed for the Grand and State Aeries based upon her role of managing such information. (Exhibit "J").[4] After being informed by McLarens that the Grand Aerie only had insurance coverage of One Million Dollars ($1,000,000.00) per occurrence from the Legion Insurance Company (incorrectly as it turned out), Mr. Cothorn duly passed this information along to Plaintiffs in a May 7, 2001 letter (Exhibit "K"). Thereafter, Plaintiffs' counsel insisted upon certified copies of the declaration sheets to confirm this coverage (Exhibit "L"). On August 31, 2001, Ms. Hollingsworth, acting on behalf of McLarens as third-party administrator for Legion Insurance, furnished Mr. Cothorn with primary liability policies from Legion for the State Aerie and the Grand Aerie, showing insurance coverages of One Million Dollars ($1,000,000.00) each, but no other coverages (Exhibit "M").

On October 31, 2001, according to Mr. Cothorn, because General Counsel George Miller indicated that he believed that additional excess insurance existed but could not recall which insurer

[4] Exhibits "J" through "O" of the present Appendix were attached to the June 19, 2002 Brief Setting Forth Recent Authority (Exhibits "B"-"G") and are part of this record. (Docket #457).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

had which policy year, McLarens investigated anew and, after the parties' meeting with the Court on November 2, 2001, McLarens advised Mr. Cothorn that Legion Insurance Company ("Legion"), indeed, had an additional Six Million Dollars ($6,000,000.00) of excess insurance coverage. Legion/McLarens also sent an independent adjuster, Ms. Diann Ralko, to attend the mandatory settlement conference set by Judge Burress on November 5, 2001 to represent both the $8,000,000.00 of primary and excess coverage, all of which was purportedly held by Legion Insurance Company. (T. 11/5/01, pp 9-19). However, later on that same day, November 5, 2001, Legion Insurance Company discovered that it did not actually have the excess coverage at all, but, in fact, excess coverage existed for the applicable policy year only through the Great American/Ohio Casualty Group. All of this was confirmed in a November 5, 2001 letter from Nancy Heinrich to John Cothorn (Exhibit "N"). When Judge Burress then insisted that Ohio Casualty appear on the next day or the Grand Aerie would be defaulted, Ohio Casualty was able to (and hastily did) send a representative, Mr. John Monnich, with its full settlement authority. (See Exhibit "O"). Nevertheless, Judge Burress defaulted the Grand Aerie as to liability anyway.

To elaborate on the above synopsis, Defense Trial Counsel did not know there might be excess coverage until Wednesday, October 31, 2001, and it was the Grand Aerie, through its General Counsel, Mr. George Miller, who corrected the Legion/McLarens/Crawford mistakes. The fact that excess coverage existed was revealed to Plaintiffs for the first time on Friday, November 2, 2001 at a pretrial conference where Donna Hollingsworth from McLarens appeared in court with full settlement authority as to the primary policies. The pretrial conference was then put over to Monday, so that a representative for the excess coverage could be in attendance. (T. 11/5/01, p 4, 9-10). On Monday, November 5, 2001, Plaintiff's counsel, Mr. Fieger, moved to seize technical advantage of the situation by asking that the Grand Aerie be defaulted because, in Mr. Fieger's

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

opinion, the adjuster present that morning (Ms. Ralko from the Crawford Agency on retention for McLarens) allegedly did not have settlement authority for each of the two (2) one million dollar policies for the Grand Aerie and State Aerie. (T. 11/5/01, pp 7-9).

Defense Trial Counsel noted that there had always been substantial compliance in answering the interrogatories because the declaration pages of the primary policies (and the policies themselves) had been provided to Plaintiffs' counsel. Furthermore, Defense Trial Counsel did not even know there was excess coverage until October 31, 2001, and he expected to be able to provide those declaration pages to Mr. Fieger later that day. (Id. at pp 9-11). Ms. Ralko testified that she had all requisite authority for both the primary **and** excess coverage obtained from Legion Insurance Company through information furnished by McLarens; however, she refused to offer any more than Two Hundred Thousand Dollars ($200,000.00) to settle the case; she claimed that she could have offered up to Eight Million Dollars ($8,000,000.00), but Ralko only wanted to settle the case for no more than Two Hundred Thousand Dollars ($200,000.00), which she felt was all the case was worth. (Id. at pp 13-15). Judge Burress then indicated that he would not enter default at that time and that jury selection could begin. However, Judge Burress wanted all insurance policy declaration pages to be furnished to Plaintiffs' counsel by the end of the day, i.e., by the end of November 5, 2001. (Id. at pp 21-22).

At that point, counsel for Howell #3607 suddenly admitted liability and withdrew all defenses, including comparative negligence (Id. at p 24). A "High-Low Agreement" between Howell #3607 and Plaintiffs was quickly placed on the record, with the potential of Three Hundred Thousand Dollar ($300,000.00) being the "high amount" Howell #3607 would have to pay (which was also its previously offered insurance policy limits), provided that Howell #3607 would admit (despite undisputed evidence to the contrary) that it was acting as an agent of the Grand Aerie. (Id.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

at pp 24-25). Counsel for the Grand Aerie objected to this "settlement" because it amounted to a fraud on the Court inasmuch as Howell #3607's policy limits had been offered long before trial; this was alleged to be an illegal "Mary Carter" agreement which injected error into the case. (Id. at pp 26-30). Judge Burress later reiterated that he wanted proof that all insurers had knowledge, notice and consent to the person representing them at later settlement conferences, and would not extend the 5:00 pm deadline for the excess coverage declaration sheets. (Id. at p 101).

Mr. Fieger repeated his claim against the Grand Aerie that it was purely vicariously liable for Howell #3607; Mr. Fieger also argued that, because Howell #3607 had stipulated to liability and had waived all defenses, the Grand Aerie, as principal, was no longer in a position to defend itself (T. 11/5/01, pp 110-111, 115), despite conceding that the question of control of the Local Aerie was, in light of the Constitution and Statues of the Grand Aerie, at least a question of fact (T. 11/5/01, p 118). The Grand Aerie again vehemently objected to the "Mary Carter" nature of the "settlement" with Howell #3607 (T. 11/5/01, pp 121-123).

On November 6, 2001 Mr. Fieger renewed his motion to default the Grand Aerie because, after review of the tendered declaration pages, Legion Insurance Company had been incorrect about its being the excess carrier, and it was Great American/Ohio Casualty that, in fact, held the excess coverage. (T. 11/6/01, pp 4-17). Judge Burress noted in fury that "somebody was going to burn". (T. 11/6/01, p 18). Legion/McLarens once truly believed that Legion had both the primary and the excess coverage which is why they represented it to the court the day before (Id. at pp 19-20). The representative of McLarens had not accurately known the name of the excess carrier, but McLarens was later able to confirm, ultimately, that it was Ohio Casualty. (Id. at pp 21-22).

Mr. Cothorn argued that there was a strong proximate causation defense to a default over the excess insurance because it was absolutely clear that Legion Insurance Company, as primary policy

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

insurer, was **never** going to tender its primary policy limits in this case under any circumstances or ever pay any more than Two Hundred Thousand Dollars ($200,000.00). (T. 11/6/01, p 26). Mr. Cothorn specifically requested that the Trial Court not fashion such a drastic remedy as default, but grant other suitable, but lesser, relief inasmuch as the Grand Aerie was innocent in this matter. The Trial Court noted that the Crawford and McLarens agencies might be good targets for sanctions. (T. 11/6/01, p 27). Again, Mr. Cothorn argued that the trial should proceed, but some other sanction less drastic than default should be utilized to do justice (Id. at pp 28-29). Mr. Cothorn suggested a less drastic remedy – - estopping Legion Insurance Company from representing that it did not have coverage in the case for the Six Million Dollars ($6,000,000.00) excess. This was an appropriate remedy to protect the Grand Aerie, but Judge Burress refused to take even this intermediate step. (Id. at p 31).

At this point, Judge Burress offered all parties an **alternative deal**. That is, Judge Burress agreed not to enter a default, provided that authorized representatives from both Legion Insurance and Ohio Casualty were present in the courtroom the next day ready to attempt to settle the case. Mr. Cothorn accepted this deal in order to avoid a default. Mr. Fieger agreed that the court had come up with a "**good alternative**," but only because (as would be later revealed) he candidly did not think Ohio Casualty would have any chance to be there. Hence, even before opening statement began, all authorized representatives of the insurers were ordered to be present on November 7, 2001 in order to avoid a default against the Grand Aerie. (Id. at pp 34-42).

On the next day, November 7, 2001, Mr. Alan Kindig and Mr. John Monnich were present as authorized representatives with full authority on behalf of Legion Insurance Company and Ohio Casualty Insurance Company, respectively, and were prepared to meet all Judge Burress' demands. (T. 11/7/01, pp 4-37). Now unable to obtain his default in light of this complete compliance with

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

these conditions, Mr. Fieger called the proceedings "a crock" and renewed his waived default request, notwithstanding his **"good alternative"** speech of the previous day. (Id. at p 38). Mr. Cothorn explained that all insurance matters were dealt with by the McLarens' adjuster and, while he did not represent the insurance company, it was certainly the claims adjuster at McLarens who handled the file and had provided all of the insurance information that turned out to be erroneous. (Id. at p 42). McLarens was first surprised that there was even excess insurance in existence, and then thought that Legion had it, and then, in effect, admitted that it had made a mistake and that the actual excess carrier for the applicable coverage period was Ohio Casualty. (Id. at pp 42-43). Again, Mr. Fieger took the position that the case was one of purely vicarious liability because Howell #3607 has admitted liability and therefore Grand Aerie is in no position to defend itself. (T. 11/7/01, p 49). Over strenuous defense objections, the Trial Court struck the Grand Aerie's Answer to the Complaint and defaulted the Grand Aerie as to liability, notwithstanding the Grand Aerie's compliance with the trial court's previous have-these-guys-here-or-else-default bargain of November 6, 2001. (T. 11/7/01, p 52-53).

Before and during the damages trial that followed, Mr. Cothorn renewed his objections to refusing to disclose the existence of the settlement agreement between Plaintiffs and Howell #3607 on "Mary Carter" grounds (11/7/01, pp 57-60; T. 11/13/01, pp 130-134, 193-202).

The final jury argument by Plaintiffs' counsel, Mr. Fieger, included his now well-worn incendiary "Organ Donation Poem," which appears in every wrongful death case he tries (T. 11/14/02, pp 86-87). Importantly, this argumentative device took place five weeks **after** the Court of Appeals had **previously** set aside a jury verdict for Mr. Fieger's identical use (Exhibit "T") of this inflammatory and irrelevant poem in Porter v Northeast Guidance Center, 2001 WL 1179672. The Michigan Supreme Court later ruled that the inflammatory use of the "Organ Donation Poem"

in argument required a new trial as to all parties and all issues, rather than a "damages only" re-trial. Porter v Northeast Guidance Center, 467 Mich 901; 653 NW2d 183 (2002).

On November 15, 2001 the Jury returned its principal verdict on the damages issues, totaling roughly Seven Million Eight Hundred, Ninety-Four Thousand Dollars ($7,894,000.00), plus applicable interest, costs and sanctions. (T 11/15/01, pp 4-9).[5]

A series of vigorously argued Post Trial Motions followed (detailed, infra, in the Argument section). The Trial Court denied all said objections and motions by the Grand Aerie, and Court denied every aspect of any form of relief or any ruling requested by the Grand Aerie whatsoever.

The Grand Aerie appealed by right to the Court of Appeals, which affirmed in a split decision. (Exhibit A). In dissent, Judge O'CONNELL noted that the Trial Court and the Court of Appeals majority had chosen to simply ignore binding precedent dictating that the Grand Aerie had no vicarious or direct liability for the child's death in this case and observed, "[W]ith such a large award falling out of the legal blue, one can only wonder at the effect that this case might have on an otherwise stable area of the law and the benevolent organizations it once protected." (Exhibit A, dissent, p 2, fn 1).

This Application for Leave to Appeal to the Michigan Supreme Court now follows.

---

[5] Fifty Thousand Dollars ($50,000.00) for medical, burial and funeral expenses [because no such evidence existed; that Trial Court reduced this immediately to Nine Thousand Dollars ($9,000.00)]; Three Million Dollars ($3,000,000.00) for the conscious pain and suffering of Kegan McClelland; One Million Dollars ($1,000,000.00) for loss of love, society and companionship to date by Mike McClelland, Lacy Harter, Jackie Reed, Tom McClelland and Linda Cox for; One Million Dollars ($1,000,000.00) for loss of love society and companionship in the future by Mike McClelland, Lacy Harter, Jackie Reed, Tom McClelland and Linda Cox; Seven Hundred Fifty Thousand Dollars ($750,000.00) for Lacy Harter's mental anguish, pain and suffering to date; One Million Dollars ($1,000,000.00) for Lacy Harter's mental anguish, pain and suffering in the future; Eighty Five Thousand Dollars ($85,000.00) for Lacy Harter's economic damages to date; and One Million Dollars ($1,000,000.00) for Lacy Harter's future economic damages. (T 11/15/01, pp 4-9)

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

REASONS FOR GRANTING THE APPLICATION

ARGUMENT I

THE DEFAULT AND THE RECORD-BREAKING $8,300,000.00 DEFAULT JUDGMENT IN THIS CASE WAS DRACONIAN TO SAY THE LEAST. THIS APPLICATION PRESENTS THIS COURT WITH A UNIQUE OPPORTUNITY TO SPEAK TO A NUMBER OF THE MOST COMPELLING ISSUES RELATING TO DISCOVERY-RELATED DEFAULTS AND DEFAULT JUDGMENTS EVER PRESENTED TO THE MICHIGAN SUPREME COURT FOR PLENARY APPELLATE REVIEW.

INTRODUCTION

That there is a great emotional divide between the majority Opinion of Judges COOPER and FORT HOOD and the dissent of Honorable Peter D. O'CONNELL speaks volumes about the enormous importance as to resolving the Application now before the Supreme Court. Judge O'CONNELL upbraided the Majority Opinion below by invoking *Hamlet's* "Antic Disposition", a stealth madness and pretended outrage to deflect the true, nefarious strategy. *Hamlet*, Act I, scene iv, line 171. But Judge O'CONNELL's outrage at the Majority was palpably genuine, however.

According to the Court of Appeals' Majority, the judgment of $8,362,483.80 properly hinged on a Default which purportedly centered around MCR 2.313(B)(2)(c); Judge O'CONNELL felt in Dissent, fn 2, however, that the problems were actually triggered by the failure of insurers to timely appear with authority at Pre-Trial Settlement Conferences. Both Majority and Dissent agreed that under MCR 2.401(G) the Trial Court was utterly without authority to default a party if its insurer fails to attend a Settlement Conference with authority, as it is only the **party's** actions, never those of the insurer, which trigger the drastic sanctions. See Kornak v ACIA, 211 Mich App 416, 536 NW2d 553 (1995); Henry v Prusak, 229 Mich 162, 582 NW2d 193 (1998); McGee v Macambo Lounge, Inc, 158 Mich App 282, 286-288, 404 NW2d 242 (1987).

While the Court of Appeals' Majority paid mere lip service to the Kornak/Henry/McGee

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

rule of law in Slip. Op. pp 4-5, the clearly erroneous focus of the Court of Appeals' Majority on the "egregious behavior" of Defendant Grand Aerie was, itself, a conduct finding patently contradicted by the record; this set the stage for the affirmance of what Judge O'CONNELL correctly excoriated in dissent as the largest discovery sanction in the history of Michigan jurisprudence. See MCR 7.302(B)(5). We contend that a record breaking sanction of $8,300,000.00 which defies MCR 2.401(G) and a host of directly contrary precedent warrants review by the Supreme Court.

The discovery relating to insurance coverage was indisputably mishandled by Legion Insurance Company, McLarens, its Third Party Administrator and Crawford, its adjusting company, all of whom erroneously advised the Trial Court (see Exhibits J-O) that Grand Aerie had, alternatively, either (1) had no excess coverage, or (2) had $6 Million of excess with Legion, or, finally, (3) had $6 Million with Ohio Casualty. But all of this took place before trial with no real harm to Plaintiffs who still had time to develop their settlement strategy with the correct, if belated, knowledge. Months before trial, Legion Insurance Company and McLarens erroneously told defense counsel on behalf of Grand Aerie who was looking for coverage that no excess coverage existed; despite the savage character assassination attempt on Mr. John Cothorn by Judges COOPER and FORT HOOD, defense trial counsel did not present "false" information; on the contrary, he actually promptly sought the answers and soon advised Plaintiffs of exactly what he had been incorrectly told by Legion/McLarens by letters based on the insurers erroneous information. (See Exhibits J-O). Furthermore, in any event, the relevancy of the insurance coverage had utterly no applicability to **discovery** liability and could not possibly have made the evidence in Plaintiffs **liability** case any different as this could never be admissible proof under MCLA 500.3030 and MRE 411.

What is presented here is the most shocking of all wildly disproportionate discovery sanctions in Michigan Legal History, targeted against an innocent Defendant-Insured without any

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

real basis in the record; the alleged discovery wrongdoing clearly was attributable, if at all, exclusively to various insurance agents and insurers. Should the innocent insured Defendant be so easily destroyed? What is presented here is not only the "clearly erroneous", grossly slanted interpretation of the Court of Appeals' Majority sufficient on its own to justify review under MCR 7.302(B)(5), but, because of the cataclysmically large judgment affirmed in a fashion which directly conflicts with existing Michigan Supreme Court and with Court of Appeals' authorities, this remarkably wrong intermediate appellate resolution constitutes a decision of enormous legal significance to the jurisprudence of the state; the decision below is in stubborn conflict with existing precedent, all of which justifies review under MCR 7.302(B)(3) and (5). This analysis now follows.

THE "CLEARLY ERRONEOUS" USE OF THE DOWNER DEPOSITION

Just how fair was Judges COOPER and FORT HOOD's use of the testimony of Richard Downer? It was extraordinarily inept, we say, to justify default against the **Grand** Aerie: Mr. Downer was merely the **State** Grand Aerie State Secretary who was a carpet installer, someone not remotely conversant with the **Grand** Aerie's complicated insurance arrangements. (Downer Dep. p 4). The Court of Appeals' Panel made the fatal mistake of suggesting that Downer, a **State** Aerie Official, **not** an official of the national **Grand** Aerie, could somehow know exactly who would be the insurance agent and what would be the insurance coverage was for the national, **Grand** Aerie. (Downer Dep. pp 62-64). The Court of Appeals' Opinion, fn 4, citing pp 62-64, fatally admitted that Downer was an officer of the **State** Aerie. Worse yet, the Court of Appeals was dead wrong that the documents sought to be produced at Mr. Downer's deposition were **NOT** stated by Plaintiffs to be the insurance documents for the Grand Aerie but, in fact, only the copies of the Constitution and the Statutes of the Eagles referenced by pp 101-102 not related to insurance. In point of record fact, the Notice of Taking Duces Tecum Deposition served on Defendants by

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Plaintiff did **NOT** in any way reference any insurance documents to be produced. The Majority, Slip Op., p.2, was grossly mistaken that Downer Dep., pp 62-64 and 101-102 supported the default which was absolutely contraindicated by the actual record. The relevant excerpted pages of the Downer Deposition, as well as the Notice of Taking Duces Tecum Deposition are attached hereto (Exhibit "P"). What is demonstrated here is an abjectly "clearly erroneous" record mistake. Just how valuable is any Intermediate Appellate Court legal analysis, which out of the box, is so wrong-headed as to be diligently record-defiant?

THE INJUSTICE OF DEFAULTING AN INSURED DEFENDANT FOR THE ACTIONS OF ITS INSURANCE COMPANIES AND AGENTS AT AN MCR 2.401 (F) CONFERENCE

It is absolutely clear that the real basis for the default in the November 2 - November 5, 2001 proceedings was Judge Burress' nuclear meltdown-overreaction to the failure of Legion Insurance Company and its Third Party Administrator McLarens (as well as its appointed adjusting agent, Crawford and Company) to identify the existence of excess coverage correctly and, even more importantly, their failure to appoint knowledgeable agents to appear at an MCR 2.401(F) conference with full settlement authority. This holding was made, sub silentio, notwithstanding the law that the Trial Court was absolutely precluded from defaulting Defendant Grand Aerie for the wrongdoing of its insurance companies and agents under MCR 2.401(G). See Kornak, Henry and McGee. The Majority below paid lip service to this prevailing rule of law in fn 13, without actually applying this strong precedent to the contrary. The Majority below attributed utterly no fault to these insurance parties, not even Plaintiffs for their staged, last-minute crisis, even though the record establishes forcefully that the principal actors were always the insurers/agents all along.

Under Henry , McGee, and Kornak, the federal Due Process problem of defaulting a defendant insured for the defalcations of the insurance company or its agents has been long established in Michigan Jurisprudence; as a matter of law, such a default is incapable of being

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

legally enforced against the **insured** client. The stealth device rationale of MCR 2.313 of "false" information [actually no more than incorrect information and only erroneously given by the insurers and agents, see Exhibits J-O) is a rule-deflecting smokescreen for Judges Burress, COOPER and FORT HOOD. As can be seen from the record, Judge Burress utterly blew his stack when the misidentification of excess insurance coverages took place before him during the November 5, 2001 and November 6, 2001 proceedings. (T. 11/5/01, pp 4-22; T. 11/06/01, pp 4-42; T. 11/7/01, pp 4-37). The MCR 2.313 Interrogatory foul up, cited at the last minute by Mr. Fieger, was caused by McLarens but was a mere gimmick to get out from under the deadly Rule against Vicarious Liability and the MCR 2.401 Rule which forbids all such defaults. Mr. Fieger played to Judge Burress' ire at having his time wasted. (Id.) What was done below was flatly illegal and, notwithstanding what solemn lip service to the law was paid by the Court of Appeals' Majority in fn 13, Opinion at Slip Opinion, p 5; this travesty inexorably demands that the Supreme Court set aside this truculent refusal to follow the Henry, Kornak and McGee rule of law which was scorned by Judges Burress, COOPER and FORT HOOD.

STANDARD OF APPELLATE REVIEW: THE SCOPE OF DISCRETION RULE

While the Court of Appeals' Majority correctly noted that, generally, an abuse of discretion standard applies to a trial court's decision on a Motion To Set Aside A Default under Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 227, 600 NW2d 638 (1999) (Court of Appeals' Slip. Opinion, fn 12), the Court of Appeals nevertheless utterly confused the separate legal standards relating to Default which distinguish, first of all, (1) when a Court may properly enter a parties default as a matter of law in the first place and then (2) when a court may properly decline to set aside a **properly entered** default. The first step in determining whether a court has abused its discretion must always be to ascertain the **scope** of the court's discretion with regard to the claimed

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

error. As such, the component question regarding the **scope** of a lower court's discretion is always a question of law that is reviewed de novo. See Traxler v Ford Motor Company, 227 Mich App 276, 280, 576 NW2d 398 (1998) (the scope of a trial court's powers to enter a default judgment under the Court Rules is a question of law which this court reviews de novo). See, also, People v Lukity, 460 Mich 484, 488, 596 NW2d 607 (1999) (admissibility of evidence under the rules, reviewed de novo). Waknin v Chamberlain, 467 Mich 329, 332, 653 NW2d 176 (2002).

Inexorably crying out for Michigan Supreme Court review now, right now, is the crucial legal question as to whether a default entered by a court because of the **insurer's** refusal to attend pretrial settlement discussion with correct insurance information and authority gives the trial court the legal power to default the insured, who, at all stages of the proceedings was completely innocent of the repeated foul ups made by the insurer or its agents or its Third Party Administrator. Again, the improper actions of a nonparty insurer in failing to engage in settlement discussions to the trial court's satisfaction is not a lawful basis for a default against the insured party. Henry v Prusak, 229 Mich App 162, 582 NW2d 193 (1998); this is not merely a matter of lower court discretion, this is the sine qua non view that the trial court does not have the power to default an insured for insurer misconduct under the clear terms of MCR 2.401(G). But that rule of law was ignored.

ABUSE OF DISCRETION IN SETTING ASIDE THE DEFAULT

In dissent, Judge O'CONNELL was very highly critical of Judge Burress for not exercising his discretion in setting aside the default because of the constellation of a host of lesser, more moderate and much less drastic sanctions which were available to rectify the situation below, without the Draconian result of an eye-popping $8,300,000.00 Default ordered by Judge Burress and autonomically affirmed by Judges COOPER and FORT HOOD. Michigan has always insisted that cases must be resolved on the legal merits, not on hyper-technicalities. Rogers v J B Hunt

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Transport, Inc, 466 Mich 645, 654, 649 NW2d 23 (2002). The rule has **always** been that insurers' errors do not destroy the rights of the insured defendant to a full trial. Walters v Arenac Circuit Judge, 377 Mich 37, 138 NW2d 751 (1961) (default will be set aside for insurance company errors) (McDonough v General Motors Corp., 6 Mich App 239, 148 NW2d 911 (1966) (insurance company errors justified "good cause" finding to set aside default, especially in light of insured's meritorious defenses); Federspiel v Bourass, 151 Mich App 656, 391 NW2d 431 (1986) (default judgment against insured for insurer errors set aside to favor determination of the litigation on the merits).

Under MCR 2.613(D)(1), the Motion to Set Aside Default before Judge Burress as filed below (Exhibit Q) should have been granted because, in this case, the record is monolithic that good cause was, indeed, shown pervasively and that an affidavit of facts indicating an absolute and meritorious defense was filed. While the standard of appellate review for setting aside such defaults is an abuse of discretion, there is, as here, a lessened requirement of "good cause" when the "meritorious defense" is shown which is legally absolute; when such a defense is absolute, this obviously affects the "good cause" requirement, substantially mollifying it, thereby reducing the ability of the trial court to refuse to set aside default and the Court of Appeals to rely upon "good cause" in the face of such an absolute and powerful defense. Aiken-Ziegler, Inc. v Waterbury Headers Corp., 461 Mich 219, 233-234, 600 NW2d 638 (1999).

The Court of Appeals' Majority happily conceded that the Grand Aerie, as a national fraternal and charitable organization, could not be vicariously or directly liable for premises liability torts of local chapters as a matter of Michigan law. Slip Op., p5, fn 18. Indeed, Judge Burress himself, amazingly, was part of the very panel which would have immunized the Grand Aerie from liability in Colangelo v Tau Kappa Epsilon Fraternity, 205 Mich App 129, 134-136, 517 NW2d 289 (1994), which Judge Burress truculently refused to follow. This familiarity with precedent caused

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Judge O'CONNELL to lament in dissent in footnote number 1, p. 2, to note that Judge Burgess himself had previously so precisely ruled in Colangelo and that Judge COOPER, Judge FORT HOOD and Judge Burgess, all three, had ignored binding precedent on this otherwise powerfully clear defense.[6] Having cheerfully conceded that the law against vicarious liability is absolute in Defendant's favor, the Court of Appeals' majority inexplicably refused to recant and, because of the absolutely clear showing of a completely dispositive defense, Judge O'CONNELL's angry dissent actually appears, on consideration, to be muted in tone by comparison at the naked refusal of three judges to follow clear precedent here.

Worse yet, the Court of Appeals' Majority, moreover, engaged in an indefensible tautology at Slip Op., pp. 5-6, on grounds that the imposition of default precluded Defendant from asserting an absolutely clear defense while at the same time utterly rejecting any of the undisputed record proofs that much, if not all, of the responsibility for the incorrect assessment of excess insurance could be laid at the feet of the insurance company and its agent, McLarens. This tautology– that the Default excuses all obligations to consider any strong reason to set the Default aside-- permeates the Opinion as this factotum explanation: No matter how good the excusable neglect, no matter how powerful the legal defense, no matter how little the prejudice to Plaintiffs, the Default justified ignoring all facts and defenses, **including** ignoring the obligation to set the Default aside.

Speaking to the monumentally clear defense which, as a matter of law, would preclude any liability, Michigan has, irrefutably favorably to Defendant Grand Aerie, long ago, settled this question of law in Kratze v Independent Order of Oddfellows, Garden City Lodge No. 11, 190 Mich App 38, 475 NW2d 405 (1991) aff'd 442 Mich 136, 500 NW2d 115 (1993) and Colangelo, supra,. Indeed, exactly as

---

[6]It gets worse. In Simmons v Sunoco, Inc., 2004 WL 981520, Judge FORT HOOD recently held on May 6, 2004 that a national petroleum company could not be found liable for vicarious liability of a putative agent as agency is only presumed when the principal takes action to authorize the agent and such agency cannot be established from the acts of the local store. (Exhibit R)

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

here, when the Fraternal Order's Constitution and Bylaws on express terms proscribe liability of the National for torts the Local Chapter and, there is no authorizing act for the precise event in question, there is no liability for the putative principal. Kaminski v Great Knights of Macchabees 146 Mich 16, 18, 109 NW 33 (1906). The refusal of the courts to extend vicarious liability based upon putative agency for the torts of local chapters to national fraternal, charitable organization is well documented in American Law which overwhelmingly favors the defense to the point of a nearly unanimous view proclaiming non-liability on the part of the national charitable organization. See fn 5, infra.

Since this legal defense is absolute, Alken-Ziegler, would inexorably impose a lessened standard of "good cause" which rule of law obviously was not given precedential force to Defendant-Appellant by the Court of Appeals' majority who made repeatedly incorrect conclusions of fact, ignored that Judge Burress was furious because the excess carriers were incorrectly identified and failed to appear until just before trial, engaged in an economic death sentence sanction when a small spanking would easily have done the task far more justly.

What was the "good cause" then? There is no dispute but that defense trial counsel John Cothorn wrote McLarens on April 19, 2001 to be provided with the amounts of primary **AND** excess coverages available to his client (see Exhibit J). Having received the wrong information from McLarens, Mr. Cothorn dutifully reported it back to Plaintiffs' counsel, incorrectly, that there was only $1 Million Dollars ($1,000,000.00) in coverage for Grand Aerie (see Exhibit K). Copies of all policies were requested by defense counsel on July 16, 2001 (see Exhibit L) as furnished by McLarens, the policies for the Michigan State Aerie Fraternal Order of Eagles and the Grand Aerie Fraternal Order of Eagles were transmitted by McLarens to defense trial counsel Cothorn on August 31, 2001 (see Exhibit M). Later, based upon Eagles' General Counsel George Millers' October 31, 2001 recollection that there was, in fact, excess insurance, Legion reinvestigated and suddenly incorrectly identified itself as the excess carrier on November 2, 2001; Legion originally thought

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

that it was the excess carrier; but on November 5, 2001, it was discovered that Legion did not, in fact, have that excess coverage which, in fact, was provided by another carrier, the Great American Insurance Company/Ohio Casualty Group as confirmed in a November 5, 2001 letter which is attached hereto as Exhibit N. Ohio Casualty scrambled to attend the proceedings with an authorized agent before trial on November 7, 2001 and gave full authority to its counsel, Mr. John Monnich (see Exhibit O). Even though Grand Aerie satisfied these last-minute requirements of the "**good alternative**" of T. 11/06/01, pp. 34-42, Judge Burress melted down anyway.

What insured **knowingly** understates insurance coverage? Contrary to the Majority Opinion, the Eagles General Counsel, Mr. George Miller, answered interrogatories in February, 2001 (see Exhibit I) which promised additional information from defense trial counsel which, in turn, was based upon what McLarens ultimately told Mr. Cothorn. In point of fact, the Grand Aerie through Mr. Miller, without knowing exactly what the excess amounts were or who had the coverage, followed through with its/his belief of the existence of excess insurance on October 31, 2001 and this persistent honesty ultimately resulted in the correct information being given to Plaintiff when the case was still before trial and when settlement positions were clearly not final. Judge Burress' hostile response to all of this was a completely out-of-proportion fury at Defendant's insurers which he unfairly took out on Defendant by transferred intent. Losing all proportional objectivity, Judge Burress said on default motion, "somebody was going to burn." (T11/6/01, p. 18) The non-party insurers and agents were not before the Court and were not in a position to be punished by Judge Burress; only Defendant-Appellant Grand Aerie Fraternal Order of Eagles as a party could be punished ; and punish the Grand Aerie Judge Burress did and with a real vengeance.

There was utterly no showing by Plaintiffs that these mistakes were anything other than negligent, accidental events, were never intentional; indeed, the misinformation which came about

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

as demonstrated on the record resulted from insurer and agent misconduct, only, if at all. (See Exhibits J-O) Indeed, the existence of excess insurance was finally corrected by the Grand Aerie itself though its General Counsel, correcting McLarens' mistake on October 31, 2001 (T. 11/05/01, p. 9, T. 11/06, p.15,T. 11/7, p.28-29, 43). Again, no insured in the universe ever intentionally **understates** $6 Million of its applicable coverage in a horrific case. When it is shown that the triggering event is not intentional, the entry of the default is usually held to be improper in a number of cases. See MacArthur Patton Christian Ass'n v Farm Bureau Insurance Group, 403 Mich 474, 477, 270 NW2d 101 (1978); Houston v Southwest Detroit Hospital, 166 Mich App 623, 628, 420 NW2d 835 (1987); Daugherty v Michigan, 163 Mich App 697, 702, 415 NW2d 279 (1987), Belloc v Koths, 163 Mich App 780, 783, 415 NW2d 18 (1987); Middleton v Marguilis, 162 Mich App 218, 222, 223, 412 NW2d 268 (1987); Edge v Ramos, 160 Mich App 231, 234, 407 NW2d 625 (1987). Furthermore, when there have been, as here, no previous instances of discovery or litigation misconduct, there should be no default, but, instead, some other form of lesser sanctions entered. MacArthur Patton, 403 Mich App at 477; Belloc, 163 Mich App at 783; Middleton, 162 Mich App at 223. See also, North v Department of Mental Health, 427 Mich 659, 662, 397 NW2d 793 (1986)(dismissal for lack of progress).

We agree with Judge O'CONNELL's vehemently dissenting view that Judge Burress had a distinctly clear legal obligation to choose lesser sanctions if those proportional measures effectuated justice. Judge Burress clearly understood that he had a constellation of lesser, more moderate options available to him rather than granting the Draconian default sanction; indeed, Judge Burress recognized that there would be long-term appellate consequences for the collection of the judgment by virtue of the default being entered (T. 11/6/01, p. 33). Judge Burress' white hot anger was that **someone** should burn. (T. 11/6/01, p. 18). At first, Judge Burress specifically chose lesser

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

sanctions [T.11/06/01, pp34-42], and, when Defendant Grand Aerie complied with them, he yanked them back, as if a martinet. At first, Judge Burress did not order default; the trial court proposed a "**good alternative**" which was that all insurance representatives with actual insurance involvement and authority should get to the table right now and that authorized representatives from Legion Insurance Company and Ohio Casualty must be present the very next day with full and appropriate authority. (T. 11/6/01, p. 34). Both Judge Burress and Mr. Fieger accepted this new ruling as a "**good alternative**" because both doubted that Ohio Casualty would be able to be present for its $6 Million Dollar ($6,000,000.00) share with an authorized representative on the very next day. (T. 11/6/01, p. 35). After waiving the alleged wrongdoing, both Judge Burress and Mr. Fieger were amazed that Ohio Casualty was there through their authorized settlement representative, Attorney John Monnich, on the very next morning on behalf of Ohio Casualty. (T. 11/7/01, p. 4). Mr. Fieger conceded that he had been given the required letter of authority giving Attorney Monnich settlement authority on behalf of Ohio Casualty. (T. 11/7/01, p. 7). Mr. Monnich stated on the record that he had all the authority he needed for a $6 Million Dollar ($6,000,000.00) settlement on the Ohio Casualty policy but noted that he might decide not to spend it, especially because Legion Insurance Company had declined to exhaust its Primary Policy layer. (T. 11/7/01, p. 9).

Alan Kindig was sworn as an authorized representative of the Legion Insurance Company; while Legion had incorrectly originally represented that Legion had all $8 Million Dollars ($8,000,000.00) of insurance authority a few days previously, Mr. Kindig now stated on behalf of Legion Insurance Company that there was only a $1 Million Dollar ($1,000,000.00) primary policy limit amount for both the Grand Aerie and the State Aerie; still, Mr. Kindig had all the authority necessary for Legion to settle the claim, (T. 11/7/01, pp. 14-20); Legion had not decided to offer more than Two Hundred Thousand Dollars ($200,000.00). (T. 11/07/01, pp.19-20). Mr. Cothorn

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

noted that he had fulfilled the directives made before and both individuals for Legion and Ohio Casualty were before the Court with authority to settle and Judge Burress' orders had been complied with on behalf of the Defendant Grand Aerie. (T. 11/7/01, pp. 25, 37). Because these impossible deadlines were met, Mr. Fieger failed to live up to the bargain by insisting on proceeding with a once-abandoned, but now resurrected, motion to default on the now-mooted grounds that the interrogatories had never been formally answered (T. 11/7/01, pp. 38-53). Despite Judge Burress' mandate of the previous date of having been completely complied with, there was animus here: despite full compliance with the alternative Judge Burress nevertheless entered the Default against Defendant as to all issues, except as to damages. (T. 11/7/01, pp. 50-53).

PROPORTIONALITY AND DEAN v. TUCKER

Again, what of Judge O'CONNELL's important questioning as to whether this was an abuse of discretion, as the sanction did not remotely proportionally approximate the severity of the offense (Dissent, p. 3)? The Court of Appeals' Majority and Judge Burress below both absolutely refused to undertake the essential Dean v Tucker, 182 Mich App 27, 32, 451 NW2d 571, 574 (1990) differential analysis which must be undertaken by the trial court **before** the drastic remedy of default or dismissal can be imposed or sustained for alleged discovery violations. Before default is authorized, Dean requires a trial court to answer a total of eight (8) questions to be undertaken before Default which, here, do not remotely support Judge Burress' exercise of "discretion" in any way. Under Dean, (1) was the violation wilful? The attached Exhibits J-O show that it was not. Secondly, was there a history of discovery wrongdoing by Defendant Grand Aerie? There was not. Third, was there prejudice to the Plaintiffs? There certainly was not; we will detail that below. Fourth, was there a way to avoid the prejudice? As trial had not yet commenced, and all authorized insurance representatives were still before the court with completely correct (if belated) information

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

fully imparted to Plaintiffs; they were still able to engage in settlement discussions; the primary carrier would never pay; the Trial Court provided alternatives which Defendant met in mitigation; the answer here is that there was no prejudice. The fifth Dean factor is whether or not there was any evidence of Grand Aerie's engaging in deliberate delay; here, Grand Aerie is completely innocent in all respects, indeed it would be absurd to jettison its own coverage. Sixth, under Dean, because Defendant Grand Aerie had been in compliance with all other portions of all other court orders, the default should be avoided. Seventh, since Grand Aerie through its counsel had done everything humanly possible in the October 31/November 7, 2001 period, and including specifically making full compliance with all of Judge Burress' demands on November 6 and November 7, 2001, the default should not have entered. Finally, and this pertains to Judge O'CONNELL's dissenting and inexorable question, there were a host of lesser sanctions which would have better served the interest of justice than a drastic default.

The Grand Aerie has been deprived of the Fourteenth Amendment Due Process here under U.S. Amend XIV. See TransAmerica Construction Company v Kulyk, 2000 WL 33534072. When an insurance company has made gross or even outrageous mistakes, federal Due Process considerations preclude defaulting the insured if other lesser sanctions, including a sizeable award of attorneys fees, or other punishment would be effective to accomplish justice. Phillips v Winsett, 717 So2d 818 (Ala. 1998). The appropriate remedy for nondisclosure of insurance coverages is usually the lesser sanction of ordering costs and interest for any attendant delays. That is what the Maine Supreme Court recently did in Maynard v Comm'r of Corrections, 681 A2d 19, 21 (fn. 4). As a matter of policy, insurance company errors are never allowed to serve as a vehicle to punish the insured. Walters; McDonough; Federspiel.

This default was a stratagem in the first place: As Judge O'CONNELL notes, the insurance

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

discovery order was only entered 3 months before trial. Why, then, did Mr. Fieger do his best to structure this shaky Default at the last minute? Because it was not possible for him to avoid the global American Rule which immunizes a national fraternal, charitable organization from tort liability, either in a vicarious or direct basis, for the wrongdoing of local chapters, as a matter of law. Such a meritorious defense is absolute and dispositive.

A COMPLETE LACK OF ANY PREJUDICE

Was there "prejudice" to Plaintiffs as a result of this confusion and series of good faith mistakes on the part of Defendant's insurers? Absolutely not: Insurance had utterly nothing to do with the liability issues, and so, the Liability Default was wildly disproportionate. There is far more, much more prejudice for Grand Aerie to be defaulted without insurance: Legion is now insolvent, Ohio Casualty has reserved rights to deny Grand Aerie's coverage on notice grounds, and the Michigan Property and Casualty Guaranty Fund has dumped the Grand Aerie. Absolutely no real prejudice can be shown by Plaintiffs; they do not even attempt to argue that they were so prejudiced. At all stages of this trial, the primary carrier, Legion, now insolvent, refused to exhaust its One Million Dollar ($1,000,000.00) policy limits; once this denial was made, it became galactically irrelevant as to whether there was some excess insurance or no coverage or whether the excess insurer was aware of the case because no excess insurer in any case will **ever** "drop down" to pay that which the Primary Carrier refuses to pay.

The record reveals no prejudice: Plaintiffs themselves expressed satisfaction below with the "**good alternative**" stated by Judge Burress and readily agreed to it on a full and knowing waiver by Mr. Fieger. (T. 11/7/01, pp. 33-35). When Defendant Grand Aerie actually unexpectedly complied with this "good alternative", Mr. Fieger suddenly changed his tune and insisted upon revisiting obtaining a default under MCR 2.313 for Defendant's allegedly having failed to answer the

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

interrogatories, information already patently and fully before the court in no uncertain terms. There was no real harm to Plaintiffs: By the time of the November 7, 2001 hearing, Plaintiff had, in fact, received all copies of insurance policies and was fully equipped to conduct settlement discussions from that point on; again, this was before any trial testimony had even been taken. Once Legion had flatly refused to pay its policy limits, Ohio Casualty was not inclined to pay as the Primary Carrier must exhaust its limits first. See Continental Cas. Co. v. Great American Insurance Company, 25 F3d 1047 (6th Cir., 1994) (construing Michigan law); Allstate Ins. Co. v Riverside Insurance Company, 509 F Supp 43 (DC Mich 1981; semble) . There was No Harm and certainly No Foul: The trial had actually not begun, and when the true facts became known and totally clarified, there was still plenty of time for Plaintiffs to make a knowledgeable demand to settle or act. A lack of prejudice, which is demonstrated here, means that no default could have been properly entered. North v Department of Mental Health, 427 Mich at 662. See, also, Pollum v Borman's Inc., 149 Mich App 57, 62-63, 385 NW2d 724 (1986).

There was no possible prejudice here from every perspective. Diann Ralko of Crawford and Company, acting on behalf of both McLarens and Legion, appeared on November 6, 2001 refused to offer no more than Two Hundred Thousand Dollars ($200,000.00)(T. 11/05/01, p. 14). The parties reconvened on November 7, 2001 at which time Mr. Monnich, on behalf of Ohio Casualty, noted that the Excess Carrier was never going to spend any excess funds until the Primary Carrier first exhausted its primary limits; Ohio Casualty insisted the Primary Carrier first exhaust all primary policy limits first. (T. 11/7/01, p. 13). On behalf of Legion, Mr. Alan Kindig attended the hearing and noted that Crawford's Diann Ralko was hired by McLarens to make an appearance by Crawford on Legion's behalf. (T. 11/7/01, p. 14). Legion hired McLarens as a Third Party Administrator to handle the claim and McLarens hired Crawford and Company. (T. 11/7/01, pp.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

14-16). Kindig asserted that he had full authority to exhaust the primary policy limits if necessary (T. 11/7/01, p. 18). And while Mr. Kindig retreated from Diann Ralko's view that Legion Insurance Company would never pay more than Two Hundred Thousand Dollars ($200,000.00), Kindig **never** proceeded to make any additional settlement offers (T. 11/7/01, p. 20), making the excess carrier a total irrelevancy. The declaration pages of all Legion and Ohio Casualty policies were furnished to Plaintiffs' counsel on November 6, 2001. (T. 11/7/01, p. 26). Mr. Cothorn said he was advised on October 31, 2001 for the first time by George Miller of the Grand Aerie that there was excess coverage. (T. 11/7/01, pp. 27-29, 43). Defendant Grand Aerie never failed to tell Mr. Cothorn about the excess policies as it was the adjusting company, McLarens, which previously had never informed Mr. Cothorn of the existence of excess policies. (T. 11/7/01, p. 29). Relying on McLarens, Mr. Cothorn was quite certain that he never sent the interrogatories to Grand Aerie (T. 11/7/01, pp. 29-30). Mr. Cothorn previously gave Plaintiffs' counsel the policies mistakenly represented by McLarens to be all, complete policies. (T. 11/7/01, pp. 30-32). It had only been in the past few days that Mr. Cothorn said General Counsel for Grand Aerie had advised him of excess; Ohio Casualty had been discovered by McLarens to be the correct excess carrier. (T. 11/7/01, pp. 30-33). Throughout the case, Donna Hollingsworth for McLarens had always told counsel John Cothorn that there was no such coverage, but when excess insurance was later discovered, it was mistakenly said by McLarens to be through Legion and then later defense counsel expressed certainty that there was Six Million Dollars ($6,000,000.00) in excess coverage from Legion based upon Ms. Ralko's incorrect representations. (T. 11/7/01, p. 34).

This Default was no less than a fit of Judicial Pique. Judge Burress was much less concerned in actuality about production of the insurance policies and far more about the irritation that fully authorized insurance agents had not appeared before him with correct insurance policy amounts or

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

identities on November 2, 5, 6 and 7, 2001. (T. 11/7/01 , pp. 35-36). On the basis of Eagles' General Counsel's October 31 recollection, it was belatedly discovered by defense counsel that Great American/Ohio Casualty was the correct excess insurer. (T. 11/7/01, p. 27-29, 43). Donna Hollingsworth from McLarens was the person that Cothorn had been dealing with all along and she had erroneously and repeatedly told Mr. Cothorn all along that there was no excess coverage. (T. 11/7/01, p. 41). The client, Grand Aerie, was not asked to verify this based on Counsel's reliance on the knowledge of the Third Party Administrator. (T. 11/7/01, p. 42). Regarding disclosure of the insurance coverages, Mr. Cothorn relied upon the adjusting company that was handling the claim, McLarens. (Id.) Mr. Cothorn probably had never even asked Defendant Eagles directly if there was excess coverage; but he discovered it when General Counsel for the client told him on October 31, 2001 that there was, in fact, excess coverage (T. 11/7/01, p. 43). That information was immediately released to Plaintiffs' counsel on November 2, 2001. (Id.) Again, Judge Burress was far more interested in his order for status conference being violated than the informally answered interrogatories. (T. 11/7/01, pp. 45-47). Again, Judge Burress was far more concerned about the existence of his sullied Judicial Dignity which he felt was befouled at the pretrial settlement conference wherein the question of excess insurance was badly handled than he ever was as to the unanswered interrogatories. (T. 11/7/01, pp. 50-52). On the basis of the failure to answer interrogatories **and** failing to have an authorized agent at the MCR 2.401(F) settlement conference [this implicates the Henry rule] that the process could not be restored, a default was ordered. (T. 11/7/01, p. 52). Also, Mr. Fieger dismissed the State Aerie from the lawsuit to remove all conflicts objections that may have existed against Mr. Cothorn. (T. 11/7/01, pp. 52-53).

CONCLUSION TO ARGUMENT I

This case is a total tragedy. What sense could it possibly have made for Grand Aerie to

misrepresent its own Excess Coverage? None whatsoever. What relevancy could a **liability** default finding have as to wholly inadmissible insurance? (See MCLA 500.3030; MRE 411.) Legion has gone insolvent. The Michigan Property & Casualty Guaranty Fund has declined any backup coverage to Grand Aerie. Ohio Casualty has reserved its rights to deny the Grand Aerie excess coverage on grounds of late notice. The Grand Aerie with its 100 plus years of charitable activity now faces extinction. Why would any insured act so recklessly to deny its own coverage to protect liable insurers? How can Fourteenth Amendment (U.S. Amend XIV) Due Process ever be satisfied when insurers act so badly that the insured is brutally punished and the feckless, innocent insured cannot do anything about it? What is presented here is an Eight Million Dollar ($8,000,000.00) liability and default stripping the defenses of Defendant Grand Aerie for errors which are demonstrably attributable only to insurers. Worse yet, the errors by the insurers should have sparked a host of other, lesser sanctions, in any event.

Any sense of proportionality here inexorably begged for lesser sanctions. But Judge Burress angrily plunged headlong into default areas expressly forbidden under MCR 2.401(G). It matters not that the Trial Court was furious at bottom that his pretrials had been scuttled by insurer misfeasance. Judges COOPER, FORT HOOD and Burress and Mr. Fieger have all combined to give themselves "cover" by pretending that MCR 2.313(B) was the basis for the default when the information was communicated belatedly and the furor clearly swirled around the MCR 2.401 (F) settlement conference proceedings. A host of extraordinarily sensitive issues center around this default and beg to be set right by the Supreme Court. What is presented here are enormously important legal questions, an encyclopedic anthology of "certworthy" questions relating to the determined effort by Judges Burress, COOPER and FORT HOOD to ignore the record and their dogged determination to refuse to follow standing case law, not only on the Default issue, but on whether or not there was

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

"Good Cause" to set aside the default on an absolutely meritorious defense in the first place.

As Judge Peter D. O'CONNELL hinted in his unusually hot Dissent calling all proceedings an "Antic Disposition" in the genre of *Hamlet*, this record-breaking Default may be the most significant civil case the Court undertakes this year. It is certainly the most Manifestly Unjust under MCR 7.302(B)(5). Defendant-Appellant respectfully requests that leave be granted and this case be assigned to plenary Supreme Court consideration and the Judgments of all lower Courts vacated.

ARGUMENT II

THE REFUSAL OF THE COURT OF APPEALS' MAJORITY AND JUDGE BURRESS TO ENTERTAIN THE SUMMARY DISPOSITION AND JNOV MOTIONS RELATING TO THE ABSENCE OF VICARIOUS LIABILITY OF A NATIONAL FRATERNAL, CHARITABLE ORGANIZATION FOR THE TORTS OF THE LOCAL GROUP IS ABSOLUTELY CONTRARY TO ESTABLISHED LAW AND PRESENTS AN EXTREMELY IMPORTANT ISSUE FOR SUPREME COURT REVIEW AFFECTING ALL MANNER OF CHARITIES AND FRATERNAL SERVICE ORGANIZATIONS.

Judges COOPER and Karen FORT HOOD cheerfully conceded below that the rule of law in this case would normally present an otherwise fatal, absolute legal defense that national fraternal, charitable organizations are not vicariously or directly liable for the premises-based torts of local chapters of the organization as a matter of Michigan law. Slip Op., p. 5, fn 18. Overlooking that such an absolute defense substantially lessens the "good cause" requirement of MCR 2.603(D)(1) as a matter of law under Alken- Ziegler and that, alone, destroys the refusal of Judges COOPER, FORT HOOD and Burress to find "good faith" to set the Default aside, the cynical refusal of Judge Burress to follow his own precedent when he was sitting by appellate assignment in Colangelo v Tau Kappa Epsilon, 205 Mich App 129, 134-136, 517 NW2d 289 (1994), makes us question the Trial Court's agenda. This refusal to follow precedent legitimately inflamed Judge O'CONNELL's outrage in dissent, together with the refusal of the Court of Appeals' majority to recognize the

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

massive injustice in imposing Eight Million Dollars ($8,000,000.00) worth of liability when a point of undisputed law stood steadfastly to the contrary. Under Michigan Supreme Court law, Rogers v J.B. Hunt Transport, Inc., 466 Mich 645, 649 NW2d 23 (2002), the tortious misbehavior of Howell #3607 could not possibly be utilized to damage the Grand Aerie with vicarious liability, even if a default of that "agent" had been granted. Just as importantly Mr. Fieger contended that the admissions of liability purchased by Mary Carter by Howell #3607 put Grand Aerie into the position of no longer being able to defend itself. (T. 11/5/01, pp. 110-111, 115). More importantly, the exhibits attached to the original Summary Disposition motion (all attached hereto as ExhibitB-H) shows that the deed in favor of Howell #3607 was exclusively the domain and exclusive realm of that entity and had utterly nothing to do with the Grand Aerie insofar as the Local Chapter were clearly completely autonomous in decision making. (See Affidavit of George Miller [see Exhibit F; see Affidavit of Richard Downer [Exhibit G] to the same effect, all exhibits of which are attached to the original Motion for Summary Disposition, Exhibit D).

On appeal before the Court of Appeals, Plaintiff was extremely hard pressed to cite any meaningful legal authority which would impose such vicarious liability. Indeed, Judge FORT HOOD on May 6, 2004 inconsistently recently adopted the prevailing legal view in the Sunoco, decision cited above which is absolutely contrary to her own actions in this case.

STANDARD OF APPELLATE REVIEW AND PRESERVATION

The grant or denial of a summary disposition is always entertained on appeal under de novo basis. Maiden v. Rozwood, 461 Mich 109, 119, 597 NW2d 817 (1999). The Trial Court refused to entertain this as a motion for judgment notwithstanding the verdict which is also reviewed under de novo basis. Meagher v Wayne State University, 222 Mich App 700, 721, 565 NW2d 401 (1997). This issue was squarely presented to Judge Burress on summary disposition motion at (T. 7/19/01,

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

pp. 4-12), in the motion to set aside default at (T. 12/13/01, p. 17) as well as on the Judgment Notwithstanding the Verdict Motion argued at (T. 12/14/02, pp. 40-41), (T. 3/1/02, pp. 48-60), (T. 6/27/02, pp. 11-16, 35-36), (T. 7/24/02, pp. 9-24, 27-32). As Plaintiffs' counsel freely admitted that Vicarious Liability was the totality of the liability sought to be imposed upon Defendant Grand Aerie (T. 11/5/01, pp. 110-111); (T. 11/07/04, p. 49). The Court of Appeals used the Default in this case as a global response, a wraparound bootstrapping tautology and a self-fulfilling prophecy to avoid setting aside the Default. The issue is therefore squarely before the court.

LEGAL DISCUSSION

It is absolutely clear under Alken-Ziegler that the total and absolute defense of the National Organization for the active torts of Local Chapter easily constitutes a Meritorious Defense which lessens the "good cause" requirement of MCR 2.603(D)(1) as no Judgment can be sustained against any such National Organization. Although MCR 2.603(A)(3) can be argued to prevent a person who has been defaulted from going forward with the defense, that subrule does nothing to render nugatory those defenses which have been asserted, and rulings obtained, on that precise point, at a time long **before** the default was entered. Such an interpretation runs directly contrary to the plain language of MCR 2.116(J)(2) which provides that a party can argue a motion for summary disposition and still raise errors of the court and taking the appeal for final judgment.

Then there is the dispositive question of **timing**. It cannot be denied but that Judge Burress had previously denied the Grand Aerie's motion in a July 19, 2001 bench ruling which was handed down months **before** the events which triggered the default. Consider Goldman v Medfit International, Inc., 982 F 2d 686 (1st Cir 1993). There, as here, the Defendant's Motion for Summary Judgment was denied. A default was **later** entered for failing to appear to pretrial hearing. On appeal, the defendant challenged the Motion for Summary Judgment. While the First

Circuit affirmed the lower court, the Appellate Court nevertheless proceeded to address the pre-default denial of summary judgment which happened **before** the default on the merits.

There is an avalanche of precedent which absolutely precludes the vicarious liability precisely sought to be imposed by Plaintiffs in this case. What is presented here is the essence of an immensely important legal question for Supreme Court review under MCR 7.302(B)(3). These cases are cited at length in the footnote on page 33 of this Application. Suffice it to say that both the Majority Opinion of Judges COOPER and FORT HOOD truthfully acknowledges the inexorable dismissal required by Kratze v Independent Order of Oddfellows, Garden City LodgeNo. 11, 190 Mich App 38, 475 NW2d 405 (1991) aff'd 442136, 500 NW2d 115 (1993) and Colangelo, supra; Judge Burress cynically refused to follow as his own decision.[7] What is presented here is of enormous interest to Bench and Bar and certainly "certworthy" in every meaningful capacity for MCR 7.302(B)(3). Hundreds of charitable and fraternal organizations that now stand at huge risk for liability and it was grossly improper for the Court of Appeals' majority and for Judge Burress to

---

[7]In point of law, the overwhelming majority of legal decisions follow Kratze and Colangelo and refuse to extend tort liability on an agency basis or on a Negligent Supervision basis over a National Organization. See, for example, Alumni Association v Sullivan, 527 A2d 1209 (Penn. 1990); Foster v Purdue University, 567 NE2d 865 (Ind. App 1991)(ability to revoke charters is not sufficient); Walker v Phi Beta Sigma Fraternity, 706 So2d 525 (La App 1997); Furek v University of Delaware, 594 A2d 506 (Del 1991); Andres v Alpha Kappa Lambda National Fraternity, 730 SW2d 547 (Mo 1987); Prime v Beta Gamma Chapter of Pi Kappa Alpha, 47 P3d 402 (Kan. 2002); Millard v Lambda Chi Alpha, 611 A2d 715 (Penn 1992); Garofalo v Lambda Chi Alpha Fraternity, 616 NW2d 647 (Iowa 2000); Pingeton v Erhartic, 2001 WL 292992 (Mass 2001); Oertel v Chi Psi Fraternity, 521 SE2d 71 (Ga App 1999); Morgan v Veterans of Foreign Wars of the United States, 565 NE2d 73 (Ill App 1991)(National Organization has no vicarious liability under Respondeat Superior); Bank of Waukegan v Epilepsy Foundation of America, 516 NE2d 1337 (Ill 1987)(Local Chapter may not make statements to bind National Chapter as Local Chapter is never an agent of the National Chapter); Stein v Beta Rho Alumni Association, Inc., 621 P2d 632 (Ore 1980)(the mere forwarding of membership fees and rent do not create an agency for tort liability); Daniels v Reel, 515 SE2d 22 (NC 1999); Alessi v Boy Scouts of America, 668 NYS2d 838 (1998)(national Boy Scout organization has no liability for activities by local troop or the scoutmaster as there is no supervision or control over the daily activities of the scoutmaster or the troop by the National Organization); Young v Boy Scouts of America, 51 P2d 191 (Cal App 1935).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

simply "brush off" prevailing but contrary law because of personal idiosyncracies.

Furthermore, both defense trial counsel and defense appellate counsel repeatedly demanded below that Plaintiffs attempt to justify the imposing liability in light of Kubczak v Chemical Bank and Trust Co., 456 Mich 653, 575 NW2d 745 (1998). There was absolutely no proof in this record -- none at all -- that established Grand Aerie had **any** active role in the tort. Grand Aerie had no dominion or control over the Howell #3607's property exclusively deeded and owned as it was by Howell #3607, independently operated by it, completely maintained by it in its discretion, including absolutely no connection with the installation of the septic riser by Mr. Wintersmith. In Kubczak, even a technical record owner was held to be completely without liability; here Grand Aerie does not even have that anorexic nexus. Grand Aerie did **nothing** to warrant the $8.3 Million Judgment. Where there is, as here, utterly no dominion and control, it is grossly unjust to attach liability to someone who has absolutely no connection with the property in any way, **at all.**

Putting it bluntly, even if Judge Burress had not botched the entry of the default because he was truly exercised, red-hot about the foul-ups with the insurance agents and insurance companies coming to his Settlement Conferences with no authority and no correct outline of existing coverages, the insurers and agents' having mismanaged the policy limits amounts, even if **some** fault could be attributed to the Grand Aerie in having failed to answer the interrogatories properly (and there is utterly no record proof of this), it would still constitute Manifest Injustice for an Eight Million Dollar ($8,000,000.00) liability, interest included, to stand simply because an absolute defense exists which mandates a No Cause for Action. Mr. Fieger slyly dealt with the not-to-be-denied-defense below because he chose to beat the outcome-determinative defense by the device of a questionable default. This cynical posturing should not be allowed to succeed.

Upon proper appellate review, Plaintiffs' verdict must be taken away. Upon appellate

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

review by the Michigan Supreme Court, important rules about National Fraternal, Charitable Organizations should be spoken to in the positive way that the Michigan Supreme Court must know is, at bottom, the just and intellectually honest thing to do. Judgment Notwithstanding the Verdict must be entered on appeal. A plainly worded opinion for Bench and Bar, on this important issue, must be authored by the Michigan Supreme Court. Truly, this may be the most important civil case this Court is likely to take center stage this year; if not the most important civil case, it is certainly the most outrageous miscarriage of justice that will be presented to our Supreme Court on the Civil Side in the upcoming term 2004-2005. For these reasons, Defendant-Appellant Grand Aerie requests that the Application for Leave to Appeal be granted and the Judgments below vacated.

ARGUMENT III

THIS APPEAL PRESENTS A SUPERB OPPORTUNITY FOR THE MICHIGAN SUPREME COURT TO SQUELCH THE EVILS OF "MARY CARTER" AGREEMENTS IN OUR COURTS ONCE AND FOR ALL.

PRESERVATION OF ISSUE AND STANDARD OF APPELLATE REVIEW

The lengthy state of the record found ante at pp. 6-9 shows that this record was clearly preserved by defense trial counsel below. Furthermore, as to what is a "Mary Carter" agreement and its legal effects are pure questions of law, reviewed de novo. Graves v. American Acceptance Mortgage Corp, 469 Mich 608, 677 NW2d 829 (2004), citing with approval, Cardinal Mooney High School v. Michigan High School Athletic Ass'n, 437 Mich. 75, 80, 467 N.W.2d 21 (1991).

LEGAL DISCUSSION

The Majority below refused even to discuss this issue, although it was plainly preserved and briefed. While Mr. Fieger was allowed to dodge the odious "Mary Carter" bullet in Rogers v City of Detroit, 457 Mich 125, 579 NW2d 840 (1998) on technicalities which are not present here, in this case, we say his luck just ran out. We hope that the Michigan Supreme Court, in a clearly worded,

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

condemnatory opinion, once and for all, will outlaw, on clearly stated Public Policy grounds, the evils of the "Mary Carter" agreement. This is a litigation deception which allows a plaintiff to settle with one defendant, keep that released defendant in the courtroom, obtain litigation cooperation from that settling defendant, whip up the jury into a frenzy with the assistance of the settling defendant, keep the entire tawdry, clandestine deal secretly away from the jury, obtain a huge verdict against the nonsettling defendant, and sustain the totality of it on grounds that Brewer v Payless Stations, Inc., 412 Mich 673, 316 NW2d 702 (1982), justifies this fraudulent miasma.[8] Brewer was never, ever intended to be both the sword and a shield. Brewer, according to this Slip Opinion, makes it acceptable to retain a settling defendant, to allow a complete fraud on the jury to glide past unnoticed, even though Brewer relates exclusively to a case involving a tortfeasor who pays his or her settlement and then **LEAVES** the litigation.

These Faustian "Mary Carter" agreements [popularized by Booth v Mary Carter Paint Company, 202 So2d 8 (Fla App 1967)] refer to clandestine settlement agreements between plaintiffs and some, but fewer than all, defendants by which the plaintiff places a secret cap or fixes limitations on the damages or financial responsibility of the settling defendants. The cooperative defendants nevertheless "remain" for trial in the case, offering the plaintiffs active or silent litigation cooperation against the nonsettling defendant, ganging up on the party who is still liable. This is an unholy treaty which the jury does not know about as the trier of fact punishes the

---

[8]The Court of Appeals' Majority begs the question in footnote 19 on p. 6 of the Slip Opinion. While it is true in most cases where the defendant **leaves** the courtroom that his or her payment can be used as a credit, this is a situation which the truly outrageous tortfeasor, Howell #3607, **remained in the courtroom,** looking hang-dog guilty, saying nothing in its defense; this would whip the jury into a frenzy thinking that it was awarding nearly $9 Million Dollars against Howell #3607. Howell #3607, of course, previously secretly protected itself with a "chump change" $300,000.00 "cap" which the jury knew nothing about when it vaporized the innocent Grand Aerie with over $ 8 Million Howell #3607 walks; the Grand Aerie is destroyed. Is this materially unjust?

nonliable"bad" defendant, without knowing the true alliances or the real way the parties are aligned cause the deep pocket "good" defendant to owe the damages awarded all by himself, herself or itself. Rogers, 457 Mich 125, 149 at fn. 22. This is a charade, a fraud.

Some states simply flatly condemn this entire, olfactory Potemkin Village on Public Policy grounds; the mere use of the Painted Lady, "Mary Carter", is regarded as fundamental, reversible poison to the fairness of the jury trial. Lum v Stinnett, 488 P2d 347 (Nev 1971); Elbaor v Smith, 845 SW2d 240, 249 (Tex 1992); Trampe v Wisconsin Telephone Co., 252 NW 675, 767-778 (Wis 1934); Cox v Kelsey Hayes Co., 594 P2d 354 (Okl 1979). Most recently, Florida, the very state which originated this hoodwink over the jury, has retreated after its horrible legal experiences, 1967-1993, and has now condemned that this deadly Mata Hari is contrary to public policy. Dosdourian v Carsten, 624 So2d 241 (Fla 1993). We hope, we pray that the Michigan Supreme Court joins the chorus of states attacking these irretrievably improper ruses as the unethical, courtroom frauds they are by outlawing them per se.

According to Rogers, a tainted "Mary Carter" agreement is one (1) which does not act as release of the settling defendant who "remains" in the case for trial purposes, (2) is structured in such a way by a "cap" to protect the settling defendant from the certain-to-follow runaway verdict and (3) gives that settling defendant an incentive to assist the plaintiff in the case when, at the same token, the deal is always kept secret from the jury. So listed, the Harter -Howell #3607 deal was a pure "Mary Carter", even if masqueraded by the Potemkin Village of a "high-low". Sunshine as to the real alignment kills the "Mary Carter"; that is why it is essential for the midnight cabal to stay in the recesses of the dimly lit back room.

The refusal to disclose a "Mary Carter" has been roundly condemned on ethical grounds in Informal Opinion of the American Bar Association, 1386 (1977) (see Exhibit"S"), to the extent that

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

the jury is precluded from hearing the terms of the secret deal, to know where the parties align themselves where they really fit in. Even in those states allowing "Mary Carter", those courts **all** absolutely insist that there be a complete disclosure to the Jury of the sleazy, "capped" bargain, lest jurors be misled, manipulated into a huge verdict will be ostensibly paid by both defendants, but, in actuality, will be paid only by the non-settling defendant who was not "capped"as to damages.[9]

This Court of Appeals' view that a "high low" somehow escapes the taint of "Mary Carter" does not appear to be the slightest bit sensible - - or fair. "The variety amongst different "Mary Carter" agreements is limited only by the creativity of the defense lawyer," said Wilkins v P & B Systems, Engineering, Inc., 741 F2d 795 (5th Cir. 1984) (fn. 2). Cases that have examined whether a "Mary Carter" can be found to be a "high low" have at least recognized the possibility that the "high low" might apply to the rule prohibiting "Mary Carter". Garrett v Mohammed, 686 So2d 629 (Fla App 1997)(no prejudice if "High Low"/Mary Carter subject to discovery and admissible in evidence as a disclosure to jury); Slusher v Ospital, 777 P2d 437 (Utah 1989).

"Mary Carter" cries out inexorably for Supreme Court review. These backroom, shade-loving deals are even more common in Michigan now and are made all the more intolerable because of the recent "Non Party At Fault" provisions of MCLA 600.2957, MCLA 600.6304 and MCR 2.112(K). Plaintiffs are now highly motivated to get impecunious "target defendants" to stay in the case so that the plaintiffs can avoid a reduction of a hugely potential Joint and Several liability verdict by having "capped" the "bad guys". Furthermore, to have impoverished the "bad guys"

---

[9]Sequoia Mfg. Co., Inc. v. Hales Constr. Co., 117 Ariz. 11, 570 P.2d 782 (1977); Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982); Ward v. Ochoa, 284 So.2d 385 (Fla.1973); G.M. Corp. v. LaHocki, 286 Md. 714, 410 A.2d 1039 (1980); L.J. Vontz Constr. Co. v. Alliance Indus., 215 Neb. 268, 338 N.W.2d 60 (1983); Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 367 A.2d 1051 (1976); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla.1979); Grillo v. Burke's Paint Co., Inc., 275 Or. 421, 551 P.2d 449 (1976); G.M. Corp. v. Simmons, 558 S.W.2d 855 (Tex.1977); see Degen v. Bayman, 86 S.D. 598, 200 N.W.2d 134 (1972).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

remain in the courtroom so that the innocent tortfeasor will stand liable **alone** is a shell-and-pea-game. The target, nonsettling defendant is then unable to use "Non Party At Fault" for "parties" still "before" the trial court. These settling defendants are parties in name only, gimmicks to defeat MCLA.600.2957, MCLA 600.6304 and MCR 2.112(K).

Rogers needs to be explained. Plaintiffs below contend that no money has allegedly changed hands between the Harter Group and the Howell #3607, so that there is no financial "incentive" for Howell #3607 to cooperate. Balderdash. Howell #3607's very existence was threatened by this litigation and the hang-dog silence arguably eroded the inevitable indemnification claim which would inexorably follow a catastrophe verdict. Besides, even if instinctual self preservation for Howell #3607 was not a sufficient "incentive" to compel Howell #3607 to act on the secret deal, there were 8.3 million reasons for **Plaintiffs** to have "incentive" to so act. The Supreme Court should grant leave to clarify Rogers to explain, lest our trials become legerdemain.

The "Mary Carter" in this case was a phony ruse. Howell #3607 had **already** offered its Three-Hundred Thousand Dollars ($300,000.00) in policy limits immediately **before** trial. Mr. Cheatham tendered full policy limits of Three-Hundred Thousand Dollars ($300,000.00) before trial and this Three-Hundred Thousand Dollars ($300,000.00) "capped" amount was reconstituted at trial as a Mary Carter-style "high low" agreement at (T. 11/5/01, pp. 23-29). When Mr. Cheatham did absolutely nothing to defend his case for Howell #3607, except to look "hang-dog" guilty to inflame the jury as it appeared Howell #3607 was callous and unfeeling, the potential for an aggravated verdict was greatly augmented. Why was Howell #3607 even in the Courtroom, as its liability was limited, except as a ploy by Mr. Fieger to whip up jury anger, to get a huge verdict against Howell #3607 which Grand Aerie, alone, in reality would have to pay, without Howell #3607 not being a Non Party At Fault to reduce the verdict? This ruse is now being implemented weekly in Michigan.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Is the Supreme Court not aware that this gimmick is being used very frequently in Michigan trial courts? Should not a global ruling stop it immediately? Or are trials to be phony "show-biz" productions, designed, like this case, to engender Screaming Headlines?

Mary Carter has been condemned under Michigan law. Smith v Childs, 198 Mich App 94, 97-98, 497 NW2d 538 (1993). It is also attacked as ethically questionable, ABA 1386. And see the excellent discussion of the evils of "Mary Carter" Agreements in 1985 DC L Law Review 605.

It is time for a sternly worded denunciation by the Supreme Court of "Mary Carter" either outright and globally as contrary to public policy or, as is partially allowed by most states allowing the agreements, always putting the unholy deal squarely before the jury; this is an extremely important legal development which inexorably and absolutely requires the Court of Last Resort of our State to speak to. The "Non-Party At Fault" system of MCR 2.112(K) and MCLA 600.2957 and MCLA 600.6304 has made an ugly situation one now completely legally intolerable under "Mary Carter." The Supreme Court should grant the within Application to declare "Mary Carter" cases irretrievably tainted under Public Policy considerations or, at the very minimum, at the very least, one in which the settlement terms are always put completely before the jury so that the jury is familiar with who purchased what testimony and what the true legal effects of what the Paid Hessians are allowed to do. MCR 2.112(K), MCLA 600.6304 and 600.2957 require no less.

Defendant-Appellant Grand Aerie respectfully requests this Court to grant the within Application For Leave To Appeal. This case will finally afford the Supreme Court an opportunity to explain Rogers to prevent the miscarriage of justice which took place in this case. The within Application is the best possible opportunity to effectuate the reforms to put "Mary Carter" out of her misery and to end her deadly role of False Courtroom Siren. It should be granted.

ARGUMENT IV

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

THE REFUSAL OF THE TRIAL COURT AND THE COURT OF APPEALS TO ENFORCE THE SETTLEMENT AGREEMENT CAPPING DAMAGES AT $300,000.00 IN FAVOR OF "AGENT" HOWELL #3607 IS AN OPPORTUNITY TO SET ASIDE THE NOMENCLATURE GIMMICKRY OF LARKIN v OTSEGO MEMORIAL HOSPITAL, 207 MICH APP 391 (1994) IN REFUSING TO EQUALIZE THE LEGAL EFFECTS OF RELEASE AGREEMENTS AND ORDERS ACCOMPLISHING RES JUDICATA.

THE ISSUE IS PRESERVED AND STANDARD OF REVIEW

Plaintiffs sought to impose concepts of vicarious liability, only, on Defendant Grand Aerie as the purported principal for the torts of the alleged agent, Howell #3607. The record is replete with vicarious responsibility being the only basis for in posing such liability. (See T. 1/4/02, pp. 40-41); (T. 7/24/02, pp. 61-69, 74-82); (T. 10./9/02, pp. 31-39); Plaintiffs' Motion for Entry of Judgment ¶5; (T. 11/5/01, pp. 26-27, 29-30); (T. 11/5/01, pp. 110-111, 115); (T. 11/7/01, p. 49). The issue-preclusive legal effect of the Three-Hundred Thousand Dollar ($300,000.00) "cap" of the high low agreement was challenged repeatedly in various briefs filed by Defendant Grand Aerie. Supplemental brief of Defendant February 25, 2002; Judgment Notwithstanding Brief in Support of Judgment Notwithstanding the Verdict Motion filed April 1, 2002, pp. 13-19. The res judicata/collateral estoppel effect of the disputed damages being capped for Defendant Grand Aerie was therefore preserved for appeal. This is a legal question reviewed de novo. Graves, supra.

LEGAL DISCUSSION

Any kind of judgment or order, even a consented to "high low" Judgment, constitutes a determination on the merits of a disputed issue and is as legally efficaciously effective as a fully litigated trial. See Vito v Howell's Trucking, 386 Mich 37, 191 NW2d 313 (1972). All defense-oriented orders inure to the benefit of the vicariously liable principal as well as the agent if they are rendered in favor of the other. See, for example, DePolo v Greig, 338 Mich 703, 711, 62 NW2d

441 (1954). Defensive use of res judicata/collateral estoppel, as well as concepts of substantive release law, inhere in the concept that the principal and agent relationship creates indigenous privity which favorably resolves all "issue preclusive" determinations. Couch v Schultz, 176 Mich App 167, 439 NW2d 296 (1989). The amount of damages always remains a disputed issue in all cases; when a lower court judgment in a lower amount against an agent is rendered, it controls the amount of damages in a subsequent action against the principal for even more damages as the disputed issue of damages is concluded under the res judicata doctrine. Klinell v Shirey, 35 Cal.Rptr. 901 (1964).

Michigan law is also absolutely plain that any formal extinction or "capped" liability as to "agent" pursuant to a "release" also limits liability and/or discharges and releases the principal pro tanto under numerous Michigan decisions led by the Theophelis v Lansing General Hospital, 430 Mich 473, 424 NW2d 478 (1988); Rzepka v Michael, 171 Mich App 748, 431 NW2d 441 (1988).

The real problem here is that ever since the Court of Appeals decided Larkin v Otsego Memorial Hospital Association, 207 Mich App 391, 525 NW2d 475 (1995), the lower courts and plaintiffs can play games with morphed, stylized releases by utilizing differing nomenclature, sometimes calling them "covenants not to sue" rather than consent judgments or releases which have both res judicata and release effect, to avoid their issue-preclusive legal effects. Justice Taylor excoriated this hypocrisy in his dissent in Larkin which has now, at long last, reached the Supreme Court for review. Our view of Justice Taylor's Larkin dissent should be heard in plenary session.

When Plaintiff agreed to take no more than Three-Hundred Thousand Dollars ($300,000.00) against Howell #3607, Plaintiff ipso facto agreed to release the Grand Aerie as principal as well in legal effect to the result of "capping" damages to the lower amount fixed for the "agent". This legal effect must be applied even if Plaintiffs did not so intend it to trigger the reduced capped limitations accordingly. See the effect of dismissal in Justice Taylor's Larkin dissent and Rzepka v Michael,

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

171 Mich App 748, 431 NW2d 441 (1988).

Once again, the Court of Appeals' majority uses the default as a "wraparound" excuse for every possible explanation in justice to set aside the default, destroying virtually all defenses and trampling all legal principles simply to sustain this outrageous judgment. Brewer v Payless Gas Stations, 412 Mich 673 (1982) has no effect in a "Mary Carter" case, as argued above. Judges COOPER and FORT HOOD's use of Larkin in fn. 20 gives this Court the chance to correct that nomenclature gamesmanship. It is time to re-examine Larkin in favor of Justice Taylor's dissent.

ARGUMENT V

THE TRIAL COURT REVERSIBLY AND PREJUDICIALLY ERRED IN FAILING TO GRANT A NEW TRIAL OR TO GRANT REMITTITUR IN THIS INFANT WRONGFUL DEATH CASE AT $8,300,000.00. THE TRIAL COURT ALSO ERRED IN FAILING TO GRANT A CREDIT FOR THE $300,000.00 HOWELL #3607 MUST PAY. THE APPLICATION SHOULD BE GRANTED TO FORMALIZE REDUCTION OF JUDGMENT PRINCIPLES.

At a principal award amount of Seven Million Eight Hundred Ninety-Four Thousand Dollars ($7,894,000.00), the verdict of the jury, obviously based on sympathy for the loss of this beautiful two (2) year old child, is completely beyond any of the proofs in the case, was greatly beyond "the highest amount the evidence will support" under MCR 2.611 (E)(1) and should have resulted in a new trial pursuant to MCR 2.611(A)(1)(c) and (d) when an Excessiveness Motion was brought before Judge Burress who summarily denied the Motion at T. 10/9/02, pp 80-81.

THE ISSUE IS PRESERVED AND STANDARD OF APPELLATE REVIEW

An extensively briefed Motion For New Trial/Remittitur was filed on April 1, 2002. It was argued at T. 10/9/02, pp 77-81. It was denied by the Trial Court, and, worse yet, was wholly ignored by the Court of Appeals Majority. This question is therefore preserved.

While Palenkas v William Beaumont Hospital, 432 Mich 527, 443 NW2d 354 (1989)

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

mandates a standard of appellate review requiring a showing of an abuse of discretion on the part of the trial court, the appellate courts of this state will not hesitate to reverse if the trial court wrongfully refuses a New Trial or Remittitur, notwithstanding the abuse of discretion standard, as is apparent from Jenkins v Raleigh Trucking Service, Inc., 187 Mich App 424, 468 NW2d 64 (1991); Precopio v City of Detroit, 415 Mich 457, 330 NW2d 802 (1982); Powell v St. John Hospital, 241 Mich 64, 614 NW2d 666 (2000).

THE "HIGHEST AMOUNT THE EVIDENCE WILL SUPPORT"

It is time to reinforce Palenkas as the Supreme Court has not revisited the necessity of Remittitur since 1982 and the Court of Appeals Majority thinks it has so little consequence as it need not even be discussed. The matter is of great jurisprudential significance. See MCR 7.302 (B) (3). Under Palenkas and MCR 2.611 (E)(1), the trial court is obliged to review the evidence in this case to see whether the verdict of the jury is greater than the highest amount the evidence will support. As was pointed out in the April 1, 2002 written Motion below and at T. 10/9/02, pp 77-82, utterly no evidence justified the wild sums granted by the jury in this case, totaling a principal sum of Seven Million Eight Hundred, Ninety-Four Thousand Dollars ($7,894,000.00) for the loss of Kegan McClelland, a lovable two (2) year old who died under ghastly conditions, but with limited conscious pain and suffering, with a mother completely disabled before this incident, with intangible pain and suffering not reduced to any demonstrable economic analysis beyond the not inconsiderable hurt feelings of the survivors. No economist testified. No out-of-pocket damages, beyond Nine Thousand Dollars ($9,000.00) in funeral expenses were shown. There were very, very few proven economic damages. The verdict of the jury was for noneconomic losses and exceeded all conceivable, rational, factual and evidentiary boundaries. A new trial should be granted in all respects, as to liability and damages, pursuant to MCR 2.611(A)(1)(c) and (d).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

COMPARABLE VERDICT STUDY

Since Palenkas, Michigan has long decided that the excessiveness, vel non, of a verdict can best be tested by comparing the verdict under review with other, similar verdicts. See Bordeaux v Celotex Corp, 203 Mich App 158, 172, 511 NW2d 899, 907 (1993) (Corrigan, J.); Precopio v City of Detroit, 415 Mich 457, 330 NW2d 802 (1982) (fn 23-31); May v William Beaumont Hosp., 180 Mich App 728, 448 NW2d 497 (1989). In the April 1, 2002 Motion filed below by Defendant Grand Aerie, dozens of cases, most of them reported, were cited to indicate that a Seven Million Eight Hundred, Ninety-Four Thousand Dollars ($7,894,000.00) award for a two (2) year old, even one who drowned horribly, was a verdict in the stratosphere, vastly beyond the mean or average of other comparable verdicts. Under Palenkas, supra, Precopio, supra, and May, supra, the obligation of the trial court is to take into account other similar Michigan cases and cases from other states to arrive at what constitutes a fair comparable verdict for the tragic, horrifying death of a two (2) year old. A review of such cases[10] reveals that Seven Million Eight Hundred, Ninety-Four Thousand

---

[10] See Green v Knazick, 2000 WL 33313791 (14 month old decedent; $1,000,000.00); Capaldi v Kmart Corp., 1996 WL 33104904 ($500,000.00; infant, 8 months of age); Burns v Consumers Power, 1990 WL 367333, infant; $1,250,000.00); Sabo v Mt. Carmel Mercy Hospital, 1990 WL 462529 (5 month old male; $850,000.00 verdict held excessive and reduced to $450,000.00); Sullivan v Smith Cabinet Manufacturing Co., 1988 WL 373149 (infant; $250,000.00); Walker v Hurley Medical Ctr., 1985 WL 351669 (infant; roughly $1,500,000.00); Mihelic v Sullivan, 686 SO2d 1130 (Ala. 1956)($550,000.00, but a new trial ordered); Strubhart v Perry Memorial Hospital Trust Authority, 903 P2d 263 (Okl. 1995)($800,000.00 for infant death originally found excessive but affirmed as adequate; Carey v Lovett, 622 A2d 1279 (NJ 1993)($550,000.00 for death of baby); Williams v Crawford, 1998 WL 767617 (Ohio)(remittitur from $1,260,000.00 to $280,000.00 for infant upheld); Arenas v Gari,706 A2d 736 (NJ 1998)($500,000.00 verdict held grossly excessive); Fruiterman v Waziri, 525 SE2d 552 (Va. 2000) ($750,000.00 award for infant reduced on remittitur motion); Johnson v United States, 780 F2d 902 (11th Cir., 1986), ($2,000,000.00 judgment for infant held to be excessive); Currens v Hampton, 939 P2d 1138 (Okl. 1997)($1,500,000.00 for child held appropriate and adequate); Lundman v. McKown 530 NW2d 807 (Minn. 1995)($10,500,000.00 award, including punitive damages, reduced to $1,500,000.00; $1,000,000.00 awards for infants in Minn. held adequate); Anderson v New Orleans Public Service, Inc., 583 So.2d 829(La. 1991)($325,000.00 held to be adequate for a mother who became substantially depressed and suicidal, as Lacy Harter claims here); McCann v ABC Ins Co, 640 So.2d 865 (La.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Dollars ($7,894,000.00) is an excessively vast multiple over similar, comparable cases which serve as a guidepost for reduction of the verdict or the granting of a new trial. Under the circumstances, Defendant Grand Aerie respectfully requests that a new trial as to all parties and all issues be granted. In the alternative, this Court grant a Remittitur down to the One Million-One Million Five Hundred Thousand Dollar ($1,000,000.00 - $1,500,000.00) level in keeping with the cited cases.

$300,000.00 HOWELL #3607 CREDIT

Just how unfair was the Majority below? Brewer, 412 Mich 673, was used to defeat the "Mary Carter" argument - - but that makes no sense for the defendant who pays but **remains** in the courtroom - - worse yet, we even lost the Brewer credit for the Three Hundred Thousand Dollars ($300,000.00)to be paid by Howell #3607! Despite Defense objections registered in the December 6, 2001 Brief in Support of Motion to Note Objections, as well as on the record at T. 1/25/02, pp 5-6, Judge Burress refused even to extend a set-off credit for the Three Hundred Thousand Dollar ($300,000.00) payment, plus applicable interest, as a result of the Howell #3607 settlement. It remains our strong belief that this Three Hundred Thousand Dollars ($300,000.00) should be the totality of what Defendant Grand Aerie, as alleged principal for this agent, is legally obligated to pay as its own damages in all respects. We certainly are entitled to this offset from our Proposed

---

App. 1994)($500,000.00 held adequate for the loss of child); Jones v Chicago Osteopathic Hospital, 738 NE2d 542 (Ill. App. 2000)($2,200,000.00 award for unusually sympathetic loss of a child and much testimony as here, regarding companionship, love and affection); Scott v Porter 530 SE2d 389 (S.C. 2000)(jury award of $1,500,000.00 held adequate for exceptionally grieving parents; Ford Motor Company v Durill, 714 SW2d 329 (Tex. App. 1986)($4,000,000.00 to parents for the death of unmarried adult daughter held grossly excessive; $600,000.00 held as not excessive); Fields v Dailey, 587 NE2d 400 (Ohio App.1990) ($1,000,000.00 award held excessive); Devito v Amalfitano, 662 NYS2d 575 (1997)(award of $350,000.00 held excessive); Dent v Perkins, 629 So.2d 1354 (La. App. 1993)($300,000.00 for emotional distress held excessive; reduced to $150,000.00 as the "highest amount the evidence could support"); Siemann v Teston, 517 So.2d 242 (La. App. 1987) ($250,000.00 held excessive even for extremely close mother and daughter relationship).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Judgment, in any event as a matter of Common Law Right. See Markley v Oak Health Care Investors, 255 Mich App 245, 660 NW2d 344 (2003). This legal whipsaw by the Court of Appeals' Majority should strike the Supreme Court as both clearly erroneous and manifestly unjust.

ARGUMENT VI

FIVE WEEKS BEFORE THE HARTER TRIAL, BOTH THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT ADVISED MR. GEOFFREY FIEGER THAT THE "ORGAN DONATION" POEM HE USES IN ALL WRONGFUL DEATH CASES WAS REVERSIBLY INFLAMMATORY. HIS REFUSAL TO HEED THAT CASE AND HIS USE OF IT INJECTED DELIBERATE PREJUDICE INTO THE TRIAL. TO ENFORCE PRECEDENT, THE APPLICATION SHOULD BE GRANTED.

STANDARD OF APPELLATE REVIEW

Because this error will be subject to an abuse of discretion standard under MCR 2.612(C), the Court of Appeals will not have hesitate to reverse for an abuse of discretion if the law is not followed. McNeil v Carol Community Hospital, 167 Mich App 492, 423 NW2d 241 (1988).

LEGAL DISCUSSION

Does precedent bind even Mr. Fieger? The cases of Porter v Northeast Guidance Center, 2001 WL 1179672 (attached hereto as Exhibit R), relief broadened to full new trial by the Michigan Supreme Court in 467 Mich 900 , 653 NW2d 183 (2002) made clear that the hideously outrageous, reversibly prejudicial Organ Donation Poem which Geoffrey Fieger uses in virtually every single Wrongful Death case he tries without fail is grossly inflammatory, irrelevant and prejudicially reversible. He still argues the device is proper, even after precedential decision by the Supreme Court. True to formula, the argument was used in this case after the Court of appeals condemned it in Porter and this Court should step in grant leave to reverse for a new trial as to all parties and all issues, based on the patented Fieger argument found in ExhibitT. Mr Fieger argued

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

the tried-and-true Poem here too at T. 11-14-01, pp.86-87, five (5) weeks before this "trial". On October 5, 2001, the Porter Court of Appeals opinion was decided. Mr Fieger ignored the mandate of the Court of Appeals at the trial on November 14, 2001. The Porter Supreme Court, furthermore, greatly expanded the appellate relief afforded by the Court of Appeals. This was done by a Supreme Court Order as to a full new trial on liability, proximate causation, comparative fault and damages. Perhaps a second reversal will be instructive as Mr. Fieger does not seem to want to follow precedent, if uniquely applied to himself.

The laws of legal gravity apply to Mr. Fieger, just like all other mere mortals. The Court of Appeals Majority's excuse-making that the Default can be affirmed (this is the Majority's one-size-fits-all-factotum excuse for every single fatal record flaw, no matter how outrageous, so that the Default becomes a stubborn, self-fulfilling, circular prophesy of being unreviewable) overlooks that the damages issue **still** remained "undefaulted", too, under Wood v. DAIIE, 413 Mich 573, 582, 321 NW2d 653 (1982) and the prejudice there was enormous as this was the basis for the Porter Court of Appeals' reversal. Mr. Fieger used an argument here condemned 5 weeks before by the Court of Appeals. Should that not have appellate consequences? We think that it should.

CONCLUSION TO APPLICATION FOR LEAVE TO APPEAL

Michigan Judicial Policy has long been that, on appeal, defaults are not favored and doubts about the Default are to be resolved on appeal in favor of the defaulting party. Wood, 413 Mich at 586. What we do know is that the principal rulings of the Trial Court challenged as stated above demonstrate the most jolting and abusive utilization of discovery sanctions power in Michigan legal history. We know that MCR 7.302(B)(3) indubitably is satisfied by a record-breaking defaulted liability of $8,300,000.00 in damages, plus interest, based upon discovery sanctions for discovery information not remotely "false" as the Majority states, but merely based upon insurance coverage

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

incorrectly figured, not even incorrectly reported by the innocent party who will be put to economic death by the default, but by insurers who have now gone insolvent or who will not stand by the insured as coverages have been dumped. The Third Party Administrator McLarens cannot deny the erroneous nature of the material given by it to defense counsel. And what was this all-consuming, crucially important case-busting material? Insurance coverage. Policy Limits amounts. Not essential liability material (which could never lead to admissible liability evidence under MCLA 500.3030 and/or MRE 411) but, at most, that which pertained to damages, or no more than to settlement posturing. When were the corrections made? On the record, **BEFORE** the trial had even started, when there was plenty of time for Plaintiffs to adapt. What insured hides its full insurance?

Since the mistakes of incorrect nondisclosure were made, at most, as mere negligence, and not even by the insured Defendant who will certainly be destroyed thereby, is this not one of the most important cases circumscribing discovery defaults ever presented to the Michigan Supreme Court for commentary? Because under Henry, Kornack, McGhee, MCR 2.401 (G) precludes the default of Grand Aerie because confused adjusters did not have their coverages straight, and because Judge Burress flew off the handle, should not the Supreme Court speak to Bench and Bar so this legal disaster— and all other similar catastrophes-- is and are avoided? There was utterly no prejudice here. The correct insurance information finally got to Plaintiffs **before** trial. The primary carrier would not pay, so who or what the excess carrier was did not mean any relevant thing. Judge Burress had a "good alternative" until Defendant Grand aerie managed to pull off compliance. Plaintiffs' accepted that "**good alternative**" but then welched on it; this should be deemed a waiver.

Furthermore, the Supreme Court has not spoken to the universally accepted rule of nonliability of National Fraternal/Charitable Organizations for the torts of putative "agents" in their Local Chapters since Kaminski in 1906. Judge Burress was obdurate here, stiff-necked enough to

refuse to apply Colangelo, even though he himself helped to write the controlling case. Fraternal and Charitable organizations cannot survive if they stand liable for the personal injury mishaps for local events as to which the National has utterly no control. It is time to reinforce that rule, loudly.

When the Supreme Court declined to apply the toxicity of "Mary Carter" to Mr. Fieger's antics in Rogers, he apparently felt sufficiently emboldened to use greater gimmicks by secret deals to whip up jury ire with impecunious settling defendants who strive to hike up huge verdicts they will not pay. But the jury is deprived of the real alliances and who will actually pay the resultant judgment. With Plaintiffs now avidly seeking to keep settling defendants in the courtroom to decimate the "Non Party At Fault" effects of MCLA 600.2957, MCLA 600.6304 and MCR 2.112(K), this is happening **daily** in dozens of Michigan Courtrooms. It is raw error, in plain violation of these statutes, if not pungent fraud. Should not the Supreme Court stop the practice?

This unusually important Application for Leave to Appeal should be granted for review. As Judge O'CONNELL intimated in Dissent, this may be the most important civil case in the 2004-2005 term. It is most assuredly "certworthy" from every other perspective, for our Court of Last Resort to examine. We respectfully request that once Full Calendar review is completed, the Judgment below should be vacated and Judgment Notwithstanding the Verdict be entered, together with all costs of appeal in the Court of Appeals and in the Michigan Supreme Court.

Respectfully submitted,

JOHN P. JACOBS, P.C.

BY: _____

JOHN P. JACOBS (P15400)
LINCOLN G. HERWEYER (P55742)
Attorneys On Appeal for Defendant-Appellant
Grand Aerie
Suite 600, The Dime Building, 719 Griswold
Post Office Box 33600
Detroit, MI 48232-5600
(313) 965-1900

June 1, 2004

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900